WISCONSIN JURY INSTRUCTIONS

CIVIL

VOL. I

WISCONSIN
CIVIL
JURY INSTRUCTIONS
COMMITTEE

UNIVERSITY OF WISCONSIN
LAW SCHOOL

WISCONSIN JURY INSTRUCTIONS

CIVIL

VOLUME I

Wisconsin Civil Jury Instructions Committee

University of Wisconsin Law School

- With 2020 Supplement

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SUMMARY OF CONTENTS

Tributes
Memorials
1981 Foreword
1978 Preface
1960 Introduction

GENERAL INSTRUCTIONS
Right to a Jury Trial 1
Suggested Order 10
Preliminary Instructions 50-66
Jurors' Duties 100-197
Evidence, Burdens, and Presumptions 200-356
Witnesses 400-425
Accrual of Action 950
NEGLIGENCE
Standard of Care Required 1000-1029
Duties of Persons in Specific Situations 1030-1413
Cause 1500-1511
Comparative Negligence 1580-1595
Imputed Negligence 1600-1610
Damages 1700-1897
Safe Place 1900.2-1911
Nuisance 1920-1932
INTENTIONAL TORTS
Assault and Battery 2000-2020
False Imprisonment 2100-2115
Federal Civil Rights 2151-2155
Conversion 2200-2201
Misrepresentation 2400-2420
Defamation 2500-2552
Misuse of Procedure 2600-2620
Trade Practices 2720-2722
Domestic Relations 2725
Business Relations 2750-2791
Civil Conspiracy; Injury to Business 2800-2822
Tort Immunity—Law Note 2900
CONTRACTS
General 3010-3095
Insurance 3100-3118
Breach of Warranty 3200-3230
Duties of Manufacturers and Sellers 3240-3310
Damages 3700-3760
AGENCY; EMPLOYMENT; BUSINESS ORGANIZATIONS 4000-4080
PERSONS 5001-7070
PROPERTY
General 8012-8060
Eminent Domain 8100-8145
TABLE OF CASES CITED
INDEX

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IN TRIBUTE TO PROFESSOR JOHN E. CONWAY

The Wisconsin Civil Jury Instructions Committee would be remiss in its acknowledgments if it failed to give public recognition to the contributions made by Professor John E. Conway in the development and success of the Wisconsin book of civil instructions. We applaud the dedicatory salutes to him by his peers on his outstanding career as a teacher, lecturer, writer, and promoter of the highest ideals of jurisprudence and focusing their direction to their most practical and professional application. (See 1980 Wis. L. Rev., Vol. 2.)

There was presented to the Board of Circuit Judges, at its 1958 meeting, a proposal to establish a permanent committee of its members to initiate, develop, and publish a book of uniform civil jury instructions. The proposal was accepted, and in June 1959, the Board sponsored two seminars at the University of Wisconsin Law School on the subject. Professor Conway of the Law School and Professor William Bradford Smith of the Extension, Department of Law, joined and cooperated to produce the organizational and administrative foundation upon which the project was based. The committee members became the author of the book; UW-Extension, Department of Law, became the sponsor and publisher; and Professor Conway was named the editor. He retained his position as editor until his retirement in early summer of 1980, except for a brief self-imposed hiatus during his tenure of more than 20 years.

As editor, Professor Conway assumed a heavy and continuing assignment. It was his function to review submissions for legal conformity, to prepare the comments, to support the proposed instruction, and to edit, redraft, and conform it in the language of the rule of "clear, concise, and correct" expression of the law.

His position as editor elicited his great talents in the field of civil law and to its practice, proceedings, and procedures. His expression of them were always tempered by his virtues of patience, composure, modesty, and conciliation. He was after all a law professor in a den of resilient circuit judges. However, even omniscient judges are sometimes swayed by proper argument supported by correct interpretation of the law. He was formidable in debate and discussion and always insistent that the basic and true issue surface and be expressed in simple, direct, and understandable language.

His broad knowledge of the law and his extensive experience in all phases of its origin and application made him exceptionally qualified to serve as an arbitrator and editor in this collegial attempt to produce a worthy and durable product. That it has succeeded to this point and has been accepted by Bench and Bar as an indispensable tool in the trial of civil actions is due in great part to the ability, tenacity, and dedication of Professor Conway. His expertise in the law, his capacity to expound and express it, and his intuitive aptitude to apply it to its correct and greatest effect made him an outstanding editor.

COMMITTEE ON CIVIL JURY INSTRUCTIONS

IN MEMORIAM
TO HONOR THE MEMORY OF JUDGE ANDREW W. PARNELL

No acknowledgment or tribute to those who have given so much to the successful creation of uniform civil jury instructions would be complete without recognition of the first chairman of the Civil Jury Instructions Committee. This committee, therefore, wishes to take the exceptional step of paying tribute to Judge Andrew W. Parnell. Judge Parnell died in 1988.

Judge Parnell was appointed Circuit Court Judge of the 10th Judicial Circuit (Outagamie, Shawano, Menominee, and Langlade Counties) in 1952 where he presided until his retirement in 1972. Homage has often been paid him for his many accomplishments, and he earned a national reputation as an outstanding jurist. His achievements are legion and cannot all be recounted here. But, to name a few, he served as chairman of The National Conference of State Trial Judges and as chairman of The Wisconsin Board of Circuit Judges, was a lecturer of national renown, and a leader in judicial education.

The idea for, and the motivating force behind, the uniform civil jury instructions came from Judge Parnell. His was the guiding hand in forming the first committee and in assuring the successful completion of its task.

His contribution went beyond the leadership he displayed in forming and guiding the committee at its inception. He continuously resolved the most complex legal problems with his wisdom, understanding, and experience.

We acknowledge Judge Parnell's guidance and initiative and we sincerely appreciate the thousands of hours of labor he contributed in this area. If there is a father of the Wisconsin Civil Jury Instructions, it is Judge Parnell whose effort, tenacity, and intelligence have made this work possible.

COMMITTEE ON CIVIL JURY INSTRUCTIONS

IN MEMORIAM
TO HONOR THE MEMORY OF JUDGE HELMUTH F. ARPS

Judge Helmuth F. Arps served as Circuit Court Judge for the 3rd Judicial Circuity (Calumet and Winnebago Counties) from April 1948 until his retirement in May 1962. Judge Arps died January 24, 1964.

In 1959, while serving as chairman of the Board of Circuit Judges, Judge Arps became associated with the Wisconsin Civil Jury Instructions Committee and later served as a committee member.

Judge Arps, who stood 6'5" and of imposing appearance, was affectionately known as "Shorty" to his colleagues and friends. A lifelong resident of Calumet County, he graduated from New Holstein High School and later pursued further scholastic endeavors at the University of Wisconsin in Madison and the University of Michigan Law School.

The judge was admitted to the Bar in 1916. After serving as district attorney for Calumet County, he served as Calumet County Judge from November 1923 until 1936. He was appointed Circuit Judge of the 3rd Judicial Circuit in 1948 by Governor Oscar Rennebohm and was thereafter elected by the people of Winnebago and Calumet Counties in two elections.

While serving on the Bench and as a member of the instructions committee, Judge Arps established an excellent reputation as a trial judge and student of the law. He was known to his colleagues as "the pipe smoking philosopher," slow to voice his opinion but when pronounced, his opinions were deliberate and sound.

Judge Arps enjoyed his work on the instructions committee, respected his colleagues, and along with them contributed to clarifying the law for the benefit of the Bench and Bar.

His contributions to the committee are reflected in the pages of the civil instructions book and will remain as a tribute to his memory.

COMMITTEE ON CIVIL JURY INSTRUCTIONS

IN MEMORIAM
TO HONOR THE MEMORY OF JUDGE M. EUGENE BAKER

In October 1959, Judge M. Eugene Baker, then the presiding Judge of the 1st Judicial Circuit, comprising the counties of Kenosha and Walworth, was named as one of the six original appointees to the Wisconsin Civil Jury Instructions Committee. His appointment reflected a recognition of his outstanding judicial qualifications and his scholastic ability to articulate and translate his knowledge and experience into a project that would portend to well serve the state judiciary and the Bar.

He was referred to in the committee as the "Counsel" for the committee. His tenure endured until his death in May 1975. He served with distinction, devotion, and dedication. He was held in high esteem by the members, blessed as he was with dignified composure, radiant and friendly personality, and outstanding qualities as a judge.

When his health failed, he tendered his resignation, but the committee refused to accept it. This was an explicit acknowledgment of his value to the committee and the great contribution he had made towards its success. It was rightly felt that his long and priceless relationship to the committee entitled him to the tribute of continuing and permanent membership.

It is impossible to single out his particular work because the end product of the committee's work is the result of collegial effort. It must be recorded, however, that when a difficult problem of evidence or law surfaced, it was generally referred to Judge Baker to resolve. This he would do with meticulous care, producing a scholarly, legally refined and correct report. In a group such as ours, it is natural that often divergent and disparate views develop on any given legal subject. Judge Baker was not one to throw himself into the arena of debate. He abided his time patiently and when called to express his views would calmly, logically, and analytically respond and bring to focus and light the issue presented and the answer to it. When arguments and discussions detracted from or obscured the real point at issue, Judge Baker would, by his ingenious art of approach, appraisal, and persuasion, bring us back to a point of clarification and suggest the language which clearly expressed what was intended.

Judge Baker will long live in our memory. His work on the committee will be perpetuated in the pages of our book and make us all realize that the particular gifts by which some judge is favored can be translated in form to produce an enlightening endowment to those who follow.

COMMITTEE ON CIVIL JURY INSTRUCTIONS

IN MEMORIAM
TO HONOR THE MEMORY OF JUDGE EDWARD M. DUQUAINE

The Honorable Edward M. Duquaine served as Circuit Court Judge for the 14th Judicial Circuit (Brown, Door, and Kewaunee Counties) from 1946 until his retirement in January 1962. Judge Duquaine died on the 8th of November of 1969. In October 1959, he was selected to serve on the original committee formed for the purpose of drafting uniform civil jury instructions and continued to serve until his retirement from the Bench.

He was an asset to what he called "the most prestigious committee." He was a student of the law. His power of concentration was immense. Nothing hurried him. He had a sense of humor, but it never upset his dignity. He thoroughly reviewed every suggested instruction and commented at length on each. He was firm in his convictions and usually was right. If Judge Baker was the "Counsel" to the committee, then surely Judge Duquaine was the "Advocate" in the group.

While the work of the committee represented a dedicated collegial effort, Judge Duquaine will be remembered by his colleagues for having persuaded the committee to adopt the standard "this burden is to satisfy you, to a reasonable certainty, by the greater weight of the credible evidence," instead of "preponderance of the evidence" which was being used by a large majority of the state trial judges at the time.

His contributions to the committee are freely distributed in the pages of this book of instructions and will remain as permanent memories to his great mind and talents.

COMMITTEE ON CIVIL JURY INSTRUCTIONS

FOREWORD
TO THE 1981 EDITION

The 1981 edition of the Wisconsin Jury Instructions-Civil is published with great pride by the Department of Law, University of Wisconsin-Extension.

This new edition contains both physical changes in its format and substantive changes in its content. The pages are larger and easier to read. They are similar in size to papers commonly used by judges and lawyers. Additionally, the large format shortens the Department's printing time and, thus, allows for more timely supplementation. In terms of substantive changes, approximately 70 new or revised instructions have been added. Moreover, the comments to approximately 100 instructions have been updated. Material which was not revised or updated is republished without change. Thus, the 1981 edition contains all of the presently approved material produced over the 22-year history of the project.

The approval date for content published thorough 1978 is indicated by the copyright at the bottom of the page. For new and revised items approved since 1978, the first paragraph of the comment indicates the year of Committee approval.

Prefaces from two earlier editions are included because they are important. In the preface to the 1978 supplement, Professor John E. Conway, then editor of the project, described the format and made recommendations for its use. Also included in its entirety is the introduction which was written in 1960 by Judge Andrew W. Parnell and accompanied the original edition. Special note should be made of the claims and disclaimers so eloquently set out by Judge Parnell, for they are as timely for this new edition as they were originally.

The Wisconsin Jury Instructions-Civil is the product of a cooperative effort between the Civil Jury Instructions Committee and the Department of Law, University of Wisconsin-Extension. This joint enterprise has continued without interruption since 1959 when the Board of Circuit Judges established the Circuit Judges Civil Jury Instructions Committee. Following the reorganization of the Wisconsin judicial system in 1978, the Committee's name was changed to the Civil Jury Instructions Committee. The first edition of Wisconsin Jury Instructions-Civil was published in December 1960, and there have been twelve supplements.

Since its inception in 1959, this project has benefited from the valuable and enthusiastic contributions by the members of the Committee who are listed on page iii. The Department expresses its appreciation to them.

Additionally, the Committee wishes to specially recognize the valuable work of nine individuals: Judges M. Eugene Baker, Helmuth F. Arps, Edward M. Duquaine, Bruce F. Beilfuss, Andrew W. Parnell, Harvey L. Neelen, Richard W. Orton, William I. O'Neill and Professor John E Conway.

The Extension Law Department is proud of the staff support it has contributed to the project. Currently, Attorney Scott C. Minter of this Department provides research support for the Committee and Roger P. Bruesewitz, publications editor, performs the

copy and technical editing tasks. In the past, Professors William Bradford Smith, Frank Mallare, August Eckhardt, and Arnon Allen assisted in the initial years of the project. Professor John Kidwell of the Law School assisted as advisor in the drafting of the contracts instructions. Under the chairmanship of Arnon Allen, the Department continued its close partnership with the Committee. Editing and production responsibilities were handled by Barbara Muckler from 1966 until 1978.

It is the continuing goal of the Committee and the University of Wisconsin-Extension that this publication remain a valuable resource for civil litigation in this state. The original Committee's dedication and commitment to this publication continues to be the model for present efforts.

Stuart G. Gullickson
Professor and Chairman
Extension Law Department

March 1981

PREFACE
TO THE 1978 SUPPLEMENT

It must be emphasized that in very few cases will it be possible to use these instructions verbatim. They are fundamentally models, or checklists, or minimum standards. A distinction must be drawn between general instructions, which might be used unchanged in many cases, and the substantive law instructions, which could hardly ever be used unchanged. As Justice Currie stated in Sharp v. Milwaukee & Suburban Transport Co., 18 Wis.2d 467, 118 N.W.2d 905, 912 (1963): "While the instructions embodied in Wis JI-Civil — Part 1 are a valuable tool to the trial courts, charges to the jury sometimes require more than a compendium of extracts from these uniform instructions without varying their wording to fit the facts of the particular case at hand." For the purpose of clarity, a particular instruction is limited to one ground of negligence; but in a trial where the evidence warrants submission of several grounds which are related, it may be necessary to modify the instructions suggested here to accommodate not only the facts of the case but also the impact of the two grounds of negligence on each other.

The general instructions are broken down into descriptive categories and presented in the logical order in which they are usually given within each category. Three-digit numbers are used for the general instructions and four-digit numbers for those dealing with substantive law. In the substantive law areas, they are arranged numerically. The gaps between the numbers have been left purposely to permit the insertion of later material. Where there is no remaining space between two whole numbers (see, e.g., numbers 1026 and 1027) and it is necessary to insert another instruction, a decimal number is used (1026.5). Instructions which are alternatives bear the same number, with one having a "A" suffixed (e.g., 1325 and 1325A). Time taken to consult the index is always well spent.

The user should always read the "Comment" appearing below the instruction in order to learn of any special conditions prerequisite to its use or other cautionary or explanatory material. In the body of the instructions will appear editorial directions enclosed in brackets and centered upon the page. Such directions tell the user to, for example, select a proper paragraph, or to insert a paragraph from a different instruction, or to read the verdict question with which the instruction deals.

When there are alternative words or phrases which may be employed, the user is alerted by italics, parentheses, or brackets. Alternative paragraphs are denoted by brackets at the beginning and end of each alternative paragraph.

The book itself may be cited as "Wis JI-Civil," adding the appropriate number, e.g., "Wis JI-Civil 405." However, it is hoped that attorneys will not refer to any of these instructions by citation in any of their requested instructions unless they are requesting the court to give the instruction verbatim as it appears in the book. It is suggested that if an attorney drafts an instruction of his own, adapting one of these instructions to his particular case, he should refer the judge to the model instruction by writing beneath his draft: "See Wis JI-Civil _____."

This book is published in loose-leaf form to facilitate its expansion at minimum publishing expense and to permit revision of instructions and comments as necessary. The usefulness will be materially increased if the members of the Bench and Bar who make use of this book will promptly report any errors they may find, either typographical or in expression of the law. We welcome your corrections or suggestions and ask only that you give us applicable citations wherever possible.

John E. Conway
Editor

March 1978

INTRODUCTION
TO THE 1960 EDITION

I have been asked to write an introduction to this book. I am pleased and proud to do so. I have lived intimately with this project for two years and I have seen it develop and grow from the embryo of an idea to this stage of its present debut; and I hope, in discussing it, I can confine my anticipation of its prospects within the bounds of modest proprieties.

In January of 1959, still in the wake of a wave of enthusiasm that engulfed me following my attendance at a panel discussion on uniform jury instructions in civil cases, I delivered a paper on uniform instructions to the Board of Circuit Judges. The panel was sponsored by the Judicial Administration Section of the American Bar Association at its annual convention at Los Angeles, in August of the preceding year, presented by four Superior Court judges and two trial attorneys of Los Angeles County.

California has been a pioneer in this work and has set up a standard that challenges its followers and defies its imitators. Its published works on civil and criminal instructions have national distribution and have been accorded a reception and acceptance that befit their quality.

To my knowledge, at least three of our neighboring states — Illinois, Iowa, and Minnesota — spurred by the California example, have undertaken similar projects and are in various stages of progress with respect to it.

In my paper to the Board I made certain recommendations to it, urging its action to initiate a like undertaking in our state. The Board was reminded that:

> The task seems monumental, but it surely is not insurmountable. It is, and should be, a function of this Board to set up the original machinery looking to the production, in due course, of uniform jury instructions in civil cases in our state. The arguments for it are patent and predominate. The ideal of progress and improvement in the judicial administration of our state should ever possess us and make us leaders in that field.

In cooperation with Professor William Bradford Smith, of the University of Wisconsin Extension Law Department, and Professor John E. Conway, of the University of Wisconsin Law School, the Board of Circuit Judges organized and conducted two seminars on jury instructions in June of 1959. These seminars did not produce immediate or recognizable results but presented excellent forums for the discussion and appraisal of the need and merits of the uniform jury instructions in our state. The interest, desire, and enthusiasm of the participating members ignited the inspirational spark that launched the program. It soon became apparent during the course of the seminars, from the discussions had, the ideas expressed, the questions asked, and the details suggested, that some overall plan would have to be formulated to bring organization, direction, and

production to this mass of helpful but nebulous intentions to produce a book worthy of the efforts expended in its preparation, production, and distribution.

Following the seminars, several meetings were held, by the chairmen and the executive committee of each seminar group, with Professor Smith and Professor Conway. At these meetings, the preliminary details of sponsoring, publishing, authoring, and editing were tentatively resolved.

The results of the seminars and the subsequent meetings were duly reported by the respective chairmen to the Board at its fall meeting. By proper resolutions, the Board created a permanent committee on jury instructions and approved the preliminary agreements that the committee would constitute the authoring personnel, Professor Conway would serve as editor, and the Extension Law Department would be the sponsor and publisher, with all rights and profits reserved to it, on its moral commitment that the prospective profits, if any, would be employed by it to the furtherance of better judicial administration in our state.

The committee was appointed in October and, at the call of the chairman, held its first meeting in Madison the latter part of that month. The members of the supreme court were invited to join the committee at a noon luncheon, and our proposals were outlined to them. We neither asked nor expected their active participation but did invite their advice, approval, and encouragement, which we received in full measure.

We decided to ask the president of the State Bar and the chairman of the Board of County Judges to appoint committees from their respective groups so that we could obtain the benefit of outside and current criticisms of our work as it progressed. These committees were appointed, and the publisher furnished current material to their members and to each member of the Board of Circuit Judges. Their criticism were fully invited but two conditions were imposed: first, that they be in writing; and, second, that they be supported by pertinent cited authorities.

We also determined the time, frequency, and places of our meetings, the procedures to prepare the agenda of our meetings, the assignments for authorship, the manner and form of submission and approval, the editing details, and the circulation of our material.

The committee met nine times, on the last Friday of each month except December. The meetings were never less than one, frequently one and one-half, and sometimes two full days in duration. We met at Madison in October, at Oshkosh in November, at Milwaukee in January and February, at Wisconsin Rapids in March, at Green Bay in April, at Kenosha in May, at Lake Delton in June, and at Sturgeon Bay in July.

The attendance at our meetings was excellent and exceptional. Quite early in our undertaking, Judge Orton was temporarily lost to our committee because of illness; and Judge Arps was invited, and agreed, to join us. The members hope that the causes that kept Judge Orton from active participation will soon be removed so that we can again benefit from his persuasive and challenging criticisms and his competent insistence that what is right in substance and statement should be adopted, that which is not, rejected.

It might be of general and passing interest to relate the manner of our approach to our work and the procedure we followed in accomplishing it. We started out by reconsidering and reevaluating the two hundred or more instructions gathered for and submitted to the seminar groups by Professor Conway. Assignments of specific proposals for instructions were timely made to each member. The assigned member had the responsibility of preparing a draft of each proposed instruction, with an accompanying brief, as comments, supporting the principle of law sought to be enunciated. Copies of his preparations were mailed to the editor, the publisher, and each committee member prior to our meeting. At the meeting, the author was called upon to read his manuscript and be prepared to fend and defend against the analytical darts of criticisms bound to be aimed at the heart of his handiwork. If it survived the challenge, it was tentatively approved. If amendments or corrections were suggested, and adopted, it was approved as amended. If it failed both tests, it was reassigned. On tentative approval, the proposed instruction was submitted to the editor for editing and arrangement of comments, and, when completed, returned by him to the author for his approval and the eventual approval by the whole committee.

By taking full and strict account of the time allotted for our meetings, we were able to process an average of 17 instructions on each assignment, giving us, as a result of our first year's efforts, about 150 approved instructions.

I speak for the members of the committee, the editor, and the publisher and hope they will not be denied the indulgence of such pride in their work as they, and it, can in good grace and becoming humility enjoy.

We made claims and disclaimers about our work.

We modestly claim that:

1. This book is the first tangible realization of a long-abiding dream of the Board of Circuit Judges relating to uniform jury instructions.

2. It is but a part of a projected end result.

3. It will be a readily available service to the trial judge in time of pressure of meeting deadlines on preparation of instructions.

4. It may be conveniently employed by the trial judge while the battle still rages about him, in his presence and hearing, deprived, as he then is, of the leisure and tranquility of legal research.

5. It will bring confidence to the new trial judges and remove for them the need of desperately seeking and gathering a disorganized file of prolix, unedited, and miscellaneous instructions from the usual sources of supply.

6. It will be an aid to the trial attorneys in preparing specific and pertinent requests for instructions.

7. It will avoid for the court the almost hopeless task of timely and correctly appraising, evaluating, and avoiding partial, slanted, incomplete, or inaccurate submitted instructions at the close of the trial.

8. It will minimize the ever-present hazards of hasty, ill-considered, or erroneous instructions.

9. It will reduce the frequency of retrials for avoidable instructional errors.

10. It will make a small but fair contribution to the betterment of judicial administration in our state trial courts.

We forcefully disclaim that:

1. It is free from error, completely accurate, or a model of perfection in form, statement, or expression.

2. It is presented as a standard of instructions pattern to be blindly and unquestionably followed.

3. It is the final answer to all instructional problems.

4. It will remove all need for the trial judge's industry and ingenuity in the preparation of instructions.

5. It has grown to the full stature of its possibilities.

6. It will lessen the duties of the trial attorneys with respect to the preparation and submission of timely written instructions.

7. It is above criticism.

8. It forestalls any constructive suggestions for its improvement.

9. It is as clear, concise, and correct as it can or ought to be.

We hope it will be accepted for what it is, a first-born issue, conceived in hope and inspiration, born of the labors of dedicated men, to be reared in the delicate and considerate atmosphere of parental attachments.

This is what we have produced within the bounds of our time and talents. We hope it will be received and accepted as a first effort which, if nurtured by industry, encouraged by support, and improved by the co-operative efforts of Bench and Bar, may in time approach the ideals of its kind.

Our joint appreciation is extended to our Board for the entrustment of this assignment to our committee; to the members of the supreme court for their interest and encouragement in our work; to the Extension Law Department of the University of Wisconsin for its help and faith in our undertaking; to Professor William Bradford Smith for his initiative, his industry, and his promotional ability; to Professor Allen; to the secretarial staff; and to Professor John E. Conway for his patience, his counsel, his knowledge, and his editorial skill.

I express my personal thanks to all of the members of the committee for their confidence, their fidelity, and the generous application of their time, efforts, and talents to this cause.

A. W. Parnell, Chairman
Jury Instructions Committee

TABLE OF CONTENTS

VOLUME I

GENERAL INSTRUCTIONS

Jurors' Duties

Inst. No.

1 Right to a Jury Trial: Law Note for Trial Judges (© 2017)
10 Suggested Order of Instructions: Negligence Cases (© 2018)
50 Preliminary Instruction: Before Trial (© 2020)
57 Juror Questioning of Witnesses (© 2014)
60 Notetaking Not Allowed (© 2011)
61 Notetaking Permitted (© 2011)
63 Transcripts Not Available for Deliberations; Reading Back Testimony (© 2011)
65 Preliminary Instruction: Use of an Interpreter for a Witness (© 2011)
66 Preliminary Instruction: Use of an Interpreter for a Juror (© 2011)
80 Recording Played to the Jury (© 2011)
100 Opening (© 2013)
103 Summary Exhibit (© 2013)
106 Submission on General Verdict (© 2010)
107 Submission on Ultimate Fact Verdict [Withdrawn © 2011]
108 Submission on Ultimate Fact Verdict When Court Finds One or More Parties at Fault [Withdrawn © 2011]
110 Remarks and Arguments of Counsel (© 2011)
115 Objections of Counsel (© 2015)
120 Ignoring Judge's Demeanor (© 2011)
125 Counsel's Reference to Insurance Company (© 2011)
130 Stricken Testimony (© 2011)
145 Special Verdict Questions: Interrelationship (© 2016)
150 Damage Question Answered by the Court (© 2005)
152 View of Scene (© 2011)
155 Question Answered by the Court (© 2011)
180 Five-Sixths Verdict (© 2017)
190 Closing: Short Form (© 2011)
191 Closing: Long Form (© 2017)
195 Supplemental Instruction Where Jury is Unable to Agree (© 2003)
197 Instruction after Verdict is Received (© 2010)

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Evidence, Burdens, and Presumptions

200 Burden of Proof: Ordinary (© 2004)
202 Burden of Proof: Ordinary: Compensatory Damages (© 2005)
205 Burden of Proof: Middle (© 2016)
210 Burden of Proof Where Verdict Contains a Middle Standard Question [Withdrawn © 1998]
215 Credibility of Witnesses; Weight of Evidence (© 2011)
220 Jury Not to Speculate [Withdrawn © 1990]
230 Circumstantial Evidence (© 2011)
255 Driver's Manual: Use by Jury [Withdrawn © 2011]
260 Expert Testimony (© 2017)
261 Medical or Scientific Treatise in Evidence (© 1989)
265 Expert Testimony: Hypothetical Questions (© 2011)
268 Opinion of a Nonexpert Witness (© 2013)
305 Measurements (© 1989)
315 Negative Testimony (© 2016)
325 Physical Facts (© 1989)
349 Presumptions and Permissive Inferences - Law Note for Trial Judges (© 2017)
350 Presumptions: Conflict as to Existence of Basic Fact; Evidence Introduced from Which Nonexistence of Presumed Fact May Be Inferred (© 2013)
352 Presumptions: Existence of Basic Fact Uncontradicted; Evidence Introduced from Which Nonexistence of Presumed Fact May Be Inferred (© 2013)
353 Presumptions: Deceased Person was Not Negligent (© 2003)
354 Presumptions: Conflict as to Existence of Basic Fact; No Evidence Introduced from Which Nonexistence of Presumed Fact Could Be Inferred (© 1991)
356 Permissive Inferences; e.g., Res Ipsa Loquitur (© 1989)

Witnesses

400 Spoliation: Inference (© 2011)
405 Falsus in Uno (© 2018)
410 Witness: Absence (© 2015)
415 Witness: Prior Conviction (© 2011)
420 Impeachment of Witnesses: Prior Inconsistent or Contradictory Statements (© 1981)
425 Witness Exercising Privilege Against Self-Incrimination (© 2011)
950 Reasonable Diligence in Discovery of Injury (Statute of Limitations) (© 2016)

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NEGLIGENCE

Standard of Care Required

1000 Unavoidable Accident (© 1989)
1001 Negligence: Fault: Ultimate Fact Verdict (© 2004)
1002 Gas Company, Duty to Customer (© 1989)
1003 Negligence, Gas Company, Duty in Installing Its Pipes, Mains, and Meters (© 1989)
1004 Negligent Versus Intentional Conduct (© 1995)
1005 Negligence: Defined (© 2016)
1006 Gross Negligence: Defined (© 2016)
1007 Contributory Negligence: Defined (© 2015)
1007.5 Contributory Negligence: Rescue Rule (© 2016)
1008 Intoxication: Chemical Test Results [Reflects Changes in 2003 Wisconsin Act 30] (© 2004)
1009 Negligence: Violation of Safety Statute (© 2010)
1010 Negligence of Children (© 2014)
1011 Attractive Nuisance: Ultimate Fact Question [Renumbered JI-Civil 8025 (© 2013)]
1012 Parents' Duty to Protect Minor Child (© 1989)
1013 Parent's Duty to Control Minor Child (© 2006)
1014 Negligent Entrustment (© 2017)
1014.5 Negligent Entrustment to an Incompetent Person (© 2017)
1015 Negligence in an Emergency [Renumbered JI-Civil-1105A © 1995]
1019 Negligence: Evidence of Custom and Usage (© 1995)
1020 Negligence: Under Special Circumstances (© 2012)
1021 Negligence of Mentally Disabled (© 2006)
1021.2 Illness Without Forewarning (© 2002)
1022.2 Negligence of General Contractor: Increasing Risk of Injury to Employee of Subcontractor (© 2020)
1022.4 Negligence: Building Contractor (© 2016)
1022.6 Liability of One Employing Independent Contractor (© 2015)
1023 Medical Negligence (© 2019)
1023.1 Professional Negligence: Medical: Duty of Physician to Inform a Patient: Special Verdict (© 2015)
1023.2 Professional Negligence: Medical: Duty of Physician to Inform a Patient (© 2015)
1023.3 Professional Negligence: Medical: Duty of Physician to Inform a Patient: Cause (© 2015)

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1023.4 Professional Negligence: Medical: Duty of Physician to Inform a Patient: Contributory Negligence (© 2015)
1023.5 Professional Negligence: Legal—Status of Lawyer as a Specialist is Not in Dispute (© 2020)
1023.5A Professional Negligence: Legal—Status of Lawyer as Specialist is in Dispute (© 1997)
1023.6 Negligence of Insurance Agent (© 2016)
1023.7 Professional Negligence: Registered Nurses and Licensed Technicians Performing Skilled Services (© 2016)
1023.8 Professional Negligence: Chiropractor-Treatment (© 2016)
1023.9 Professional Negligence: Chiropractor-Determining Treatability by Chiropractic Means (© 1999)
1023.14 Professional Negligence: Dental (© 2016)
1023.15 Professional Negligence: Chiropractor, Dentist, Optometrist, or Podiatrist: Duty to Inform a Patient: Special Verdict (© 2015)
1023.16 Professional Negligence: Chiropractor, Dentist, Optometrist, or Podiatrist: Duty to Inform a Patient (© 2015)
1023.17 Professional Negligence: Chiropractor, Dentist, Optometrist, or Podiatrist: Duty to Inform a Patient: Cause (© 2015)
1024 Professional Negligence: Medical: Res Ipsa Loquitur (© 2017)
1025 Negligence of a Common Carrier (© 2006)
1025.5 Bailment: Defined (© 2009)
1025.6 Duty of Bailor for Hire (© 1992)
1025.7 Bailment: Duty of Bailee under a Bailment for Mutual Benefit (© 2009)
1025.8 Bailment: Liability of a Gratuitous Bailor (© 2009)
1026 Bailment: Negligence of Bailee May Be Inferred (© 2005)
1026.5 Bailment: Negligence of Carrier Presumed (© 2005)
1027 Duty of Owner of Place of Amusement: Common Law [Renumbered JI-Civil 8040 © 1985]
1027.5 Duty of a Proprietor of a Place of Business to Protect a Patron from Injury Caused by Act of Third Person [Renumbered JI-Civil 8045 © 1986]
1027.7 Duty of Hotel Innkeeper [Renumbered JI-Civil 8050 © 1986]
1028 Duty of Owner of a Building Abutting on a Public Highway [Renumbered JI-Civil 8030 © 1986]
1029 Highway or Sidewalk Defect or Insufficiency [Renumbered JI-Civil 8035 © 1986]

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Duties of Persons in Specific Situations

1030 Right to Assume Due Care by Highway Users (© 1992)
1031 Conditional Privilege of Authorized Emergency Vehicle Operator (© 2016)
1032 Defective Condition of Automobile: Host's Liability (© 1992)
1035 Voluntary Intoxication: Relation to Negligence (© 2004)
1045 Driver's Duty When Children Are Present (© 1992)
1046 Contributory Negligence of Passenger: Placing Self in Position of Danger (© 1992)
1047 Contributory Negligence of Guest: Riding with Host (© 1992)
1047.1 Negligence of Guest: Active: Management and Control (© 1992)
1048 Driver, Negligence: Highway Defect or Insufficiency (© 1992)
1049 Pedestrian, Negligence: Sidewalk Defect or Insufficiency (© 1989)
1050 Duty of Persons with Physical Disability (© 2005)
1051 Duty of Worker: Preoccupation in Work Minimizes Duty (© 1995)
1051.2 Duty of Worker: When Required to Work in Unsafe Premises (© 1992)
1052 Equipment and Maintenance of Vehicles: General Duty (© 2008)
1053 Equipment and Maintenance of Vehicles: Headlights (© 2008)
1054 Equipment and Maintenance of Vehicles: Brakes (© 2008)
1055 Lookout (© 1997)
1056 Lookout: Camouflage (© 2013)
1060 Lookout: Backing (© 2008)
1065 Lookout: Entering or Crossing A Through Highway (© 2003)
1070 Lookout: Failure to See Object in Plain Sight (© 1992)
1075 Lookout: Guest (© 1996)
1076 Lookout: Guest's Duty to Warn (© 1992)
1080 Lookout: Limited Duty on Private Property (© 1992)
1090 Driver on Arterial Approaching Intersection: Lookout; Right of Way; Flashing Yellow Signal (© 1992)
1095 Lookout: Pedestrian (© 2008)
1096 Duty to Sound Horn (© 2008)
1105 Management and Control (© 2008)
1105A Management and Control–Emergency (© 2016)
1107 Racing (© 2008)
1112 Operation of Automobile Following Another (© 2015)
1113 Duty of Preceding Driver: Slowing or Stopping: Signalling (© 2008)
1114 Duty of Preceding Driver to Following Driver: Lookout (© 2008)
1115 Parking: Stopping: Leaving Vehicle Off the Roadway (© 2008)
1120 Parking: Stopping: Leaving Vehicle On the Roadway (© 2008)
1125 Parking: Stopping: Leaving Vehicle On or Off the Roadway: Exception to Prohibition (© 2008)

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1132 Stopped School Bus: Position on Highway (© 2008)
1133 School Bus: Flashing Red Warning Lights (© 2008)
1135 Position on Highway on Meeting and Passing (© 2008)
1140 Position on Highway on Meeting and Passing; Violation Excused (© 2008)
1141 Passing: Vehicles Proceeding in Same Direction (© 2008)
1142 Passing: Vehicles Proceeding in Same Direction: Obstructed View (© 2008)
1143 Passing: Vehicles Proceeding in Same Direction: In No Passing Zone or Where Overtaken Vehicle Turning Left (© 2008)
1144 Passing: Vehicles Proceeding in Same Direction (© 2015)
1145 Res Ipsa Loquitur (© 2002)
1153 Right of Way: At Intersection with Through Highway (© 2008)
1155 Right of Way: At Intersections of Highways (© 2008)
1157 Right of Way: At Intersection of Highways: Ultimate Verdict Question (© 2008)
1158 Right of Way: To Pedestrian Crossing at Controlled Intersection (© 2008)
1159 Right of Way: Pedestrian Control Signal: Walk Signal (© 2008)
1160 Right of Way: To Pedestrian at Intersections or Crosswalks on Divided Highways or Highways Provided with Safety Zones (© 2008)
1161 Right of Way: Pedestrian Crossing Roadway at Point Other Than Crosswalk (© 1982)
1165 Right of Way: To Pedestrian at Uncontrolled Intersection or Crosswalk (© 2008)
1170 Right of Way: Blind Pedestrian on Highway (© 2008)
1175 Right of Way: Entering Highway from an Alley or Nonhighway Access Point (© 2008)
1180 Right of Way: Funeral Processions; Military Convoys (© 2008)
1185 Right of Way: Green Arrow (© 2008)
1190 Right of Way: Green Signal (© 2008)
1190.5 Plaintiff and Defendant Each Claims Green Light in Their Favor (© 2008)
1191 Duty of Driver Entering Intersection with Green Light in Driver's Favor: Lookout (© 2008)
1192 Duty of Driver Approaching Intersection When Amber Light Shows (© 2008)
1193 Red Traffic Control Light Signalling Stop (© 2008)
1193.5 Flashing Red Traffic Control Light (© 2008)
1195 Right of Way: Left Turn at Intersection (© 2008)
1200 Right of Way: Livestock (© 2008)
1205 Right of Way: Moving from Parked Position (© 2008)
1210 Right of Way: On Approach of Emergency Vehicle (© 2008)
1220 Right of Way: Pedestrian's Duty: At Pedestrian Control Signal (© 2008)
1225 Right of Way: Pedestrian's Duty: Crossing at Controlled Intersection or Crosswalk (© 2008)
1230 Right of Way: Pedestrian's Duty: Crossing Roadway at Point Other than Crosswalk (© 2008)

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1235 Right of Way: Pedestrian's Duty: Divided Highways or Highways with Safety Zones (© 2008)
1240 Right of Way: Pedestrian's Duty: Facing Green Arrow (© 2008)
1245 Right of Way: Pedestrian's Duty: Facing Red Signal (© 2008)
1250 Right of Way: Pedestrian's Duty: Standing or Loitering on Highway (© 2008)
1255 Right of Way: Pedestrian's Duty at Uncontrolled Intersection or Crosswalk; Suddenly Leaving Curb or Place of Safety (© 2008)
1260 Position on Highway: Pedestrian's Duty; Walking on Highway (© 2008)
1265 Right of Way: Persons Working on Highway (© 2008)
1270 Right of Way: When Vehicle Using Alley or Nonhighway Access to Stop (© 2008)
1275 Right of Way: When Yield Sign Installed (© 2008)
1277 Safety Belt: Failure to Use (© 2009)
1278 Safety Helmet: Failure to Use (© 2009)
1280 Skidding (© 2008)
1285 Speed: Reasonable and Prudent; Reduced Speed (© 2008)
1290 Speed: Fixed Limits (© 2008)
1295 Speed: Special Restrictions for Certain Vehicles (© 2008)
1300 Speed: Impeding Traffic (© 2008)
1305 Speed: Failure to Yield Roadway (© 2015)
1310 Speed: Obstructed Vision (© 2008)
1315 Speed: Obstructed Vision: Nighttime (© 2008)
1320 Speed: Camouflage (© 1992)
1325 Stop at Stop Signs (© 2008)
1325A Stop at Stop Signs [Alternate] (© 2008)
1330 Stop: Emerging from an Alley (© 2008)
1335 Emerging from a Private Driveway or Other Nonhighway Access (© 2008)
1336 Railroad Crossing: Driver's Duty (© 2008)
1337 Stop: All Vehicles at Railroad Crossing Signals (© 2015)
1337.5 Stop: Pedestrian Crossing Railroad Tracks (© 2015)
1338 Stop: Nonoperation of Railroad Crossing Signals (© 2008)
1339 Stop: Special Vehicles at Railroad Crossing (© 2008)
1340 Stop: For School Bus Loading or Unloading Children (© 2008)
1350 Turn or Movement: Signal Required (© 2008)
1352 Turn: Position and Method When Not Otherwise Marked or Posted (© 2008)
1354 Turn or Movement: Ascertainment that Turn or Movement Can Be Made with Reasonable Safety: Lookout (© 2009)
1355 Deviation from Traffic Lane: Clearly Indicated Lanes (© 2008)

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Other Negligence

1380 Negligence: Teacher: Duty to Instruct or Warn (© 2020)
1381 Negligence: Teacher: Duty to Supervise Students (© 2016)
1383 Employer Negligence: Negligent Hiring, Training, or Supervision (© 2019)
1384 Duty of Hospital: Granting and Renewing Staff Privileges (Corporate Negligence) (© 2017)
1385 Negligence: Hospital: Duty of Employees: Performance of Routine Custodial Care Not Requiring Expert Testimony (© 1999)
1385.5 Negligence: Hospital: Duty of Employees: Suicide or Injury Resulting from Escape or Attempted Suicide (© 2006)
1390 Injury by Dog (© 2017)
1391 Liability of Owner or Keeper of Animal: Common Law (© 2016)
1395 Duty of Public Utility: Highway Obstructions: Nonenergized Facilities (© 1989)
1397 Negligence: Voluntary Assumption of Duty to a Third Person (© 2014)

RAILROADS

1401 Railroads: Duty to Ring Engine Bell Within Municipality (© 2007)
1402 Railroads: Duty to Ring Engine Bell Outside Municipality (© 2007)
1403 Railroads: Duty to Blow Train Whistle Within Municipality [Withdrawn © 2007]
1405 Railroads: Duty of Train Crew Approaching Crossing (© 2006)
1407 Railroads: Speed: Fixed Limits (© 2006)
1408 Railroads: Speed: No Limit (© 2006)
1409 Railroads: Negligent Speed, Causation (© 2006)
1410 Railroads: Duty to Maintain Crossing Signs (© 2006)
1411 Railroads: Duty to Maintain Open View at Crossings (© 2006)
1412 Railroads: Duty to Have Proper Headlights (© 2006)
1413 Railroads: Ultrahazardous or Unusually Dangerous Crossings: Increased Duty (© 2006)

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TABLE OF CONTENTS

VOLUME II

NEGLIGENCE (Continued)

1500 Cause (© 2006)
1501 Cause: Normal Response (© 1998)
1505 Cause: Where Cause of Death is in Doubt (© 1998)
1506 Cause: Relation of a Medical Procedure to the Accident (© 1998)
1510 Negligent Infliction of Severe Emotional Distress (Bystander Claim) (© 2014)
1511 Personal Injuries: Negligent Infliction of Severe Emotional Distress (Separate or Direct Claim) (© 2018)

Comparative Negligence

1580 Comparative Negligence: Plaintiff and One or More Defendants (© 2011)
1582 Comparative Negligence: Adult and Child (© 1990)
1585 Comparative Negligence: Plaintiff-Guest and Host-Defendant Negligent (© 1992)
1590 Comparative Negligence: Plaintiff-Guest Passively Negligent; Host (Or Other Driver) Negligent (© 2003)
1591 Comparative Negligence: Guest Passively Negligent; Claims Against and Among Drivers; Apportionment from One Comparative Negligence Question (© 2015)
1592 Comparative Negligence: Guest Passively Negligent; Claims Against and Among Drivers; Apportionment of Comparative Negligence from Two Questions (© 2003)
1595 Comparative Negligence: Where Negligence or Cause Question Has Been Answered by Court (© 1990)

Imputed Negligence

1600 Servant: Driver of Automobile (Presumption from Ownership of Vehicle) (© 2003)
1605 Driver: Scope of Employment (© 2014)
1610 Joint Adventure (Enterprise): Automobile Cases (© 1990)

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Damages

1700 Damages: General (© 2016)
1705 Damages: Burden of Proof in Tort Actions: Future Damages [Withdrawn © 2001]
1707 Punitive Damages: Nonproducts Liability [For Actions Commenced Before May 17, 1995] (© 1996)
1707A Punitive Damages: Products Liability [For Actions Commenced Before May 17, 1995] (© 1996)
1707.1 Punitive Damages: Nonproducts Liability (© 2018)
1707.2 Punitive Damages: Products Liability (© 2008)
1708 Battery: Punitive Damages: Mitigation by Provocation [Withdrawn © 2010]
1710 Aggravation of Injury Because of Medical Negligence (© 2015)
1715 Aggravation of Pre-existing Injury (© 1990)
1720 Aggravation or Activation of Latent Disease or Condition (© 1992)
1722 Damages from Nonconcurrent or Successive Torts (© 1992)
1722A Damages from Nonconcurrent or Successive Torts (To be used where several tortfeasors are parties) (© 1996)
1723 Enhanced Injuries (© 2009)
1725 Further Injury in Subsequent Event (© 2003)
1730 Damages: Duty to Mitigate: Physical Injuries (© 2012)
1731 Damages: Duty to Mitigate: Negligence or Breach of Contract (© 2012)
1732 Damages: Duty to Mitigate: Intentional Tort (© 2012)
1735 Damages: Not Taxable as Income (© 1990)
1740 Damages: Common Scheme or Plan; Concerted Action (Wis. Stat. § 895.045(2)) (© 2009)
1741 Personal Injuries: Negligence in Informing the Patient (© 2015)
1742 Personal Injuries: Medical Care: Offsetting Benefit from Operation Against Damages for Negligence in Informing the Patient (© 2015)
1749 Personal Injuries: Conversion Table for 1998 Revision of Damage Instructions (© 1998)
1750.1 Personal Injuries: Subdivided Question as to Past and Future Damages (© 1998)
1750.2 Personal Injuries: Past and Future: One Verdict Question (Except Past Loss of Earnings and Past Medical Expenses) (© 1998)
1754 Personal Injury: One Subdivided Question as to Past Damages [Withdrawn © 1998]
1756 Personal Injuries: Past Health Care Expenses (© 2015)
1757 Personal Injuries: Past Health Care Expenses (Medical Negligence Cases) (Negligence of Long-Term Care Provider): Collateral Sources (© 2013)
1758 Personal Injuries: Future Health Care Expenses (© 2010)
1760 Personal Injuries: Past Loss of Earning Capacity (© 2016)

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1762 Personal Injuries: Future Loss of Earning Capacity (© 2003)
1766 Personal Injuries: Past Pain, Suffering, and Disability (Disfigurement) (© 2009)
1767 Personal Injuries: Future Pain, Suffering, and Disability (Disfigurement) (© 1999)
1768 Personal Injuries: Past and Future Pain, Suffering, and Disability (Disfigurement) (© 1998)
1770 Personal Injuries: Severe Emotional Distress (© 2006)
1780 Personal Injuries: Loss of Business Profits [Withdrawn © 1998]
1785 Personal Injuries: Past Loss of Professional Earnings [Withdrawn © 1998]
1788 Loss of Earnings: Delay in Obtaining Degree [Withdrawn © 1999]
1795 Personal Injury: Life Expectancy and Mortality Tables (© 1992)
1796 Damages: Present Value of Future Losses (© 2003)
1797 Damages: Effects of Inflation (© 1993)
1800 Property: Loss of Use of Repairable Automobile (© 1997)
1801 Property: Loss of Use of Nonrepairable Automobile (© 1997)
1803 Property: Destruction of Property (© 2010)
1804 Property: Damage to Repairable Property (© 2010)
1805 Property: Damage to Nonrepairable Property (© 2010)
1806 Property: Damage to a Growing Crop (© 1997)
1810 Trespass: Nominal Damages (© 2013)
1812 Quantum Meruit: Measure of Services Rendered (© 1992)
1815 Injury to Spouse: Loss of Consortium (© 2012)
1816 Injury to Spouse: Past Loss of Earning Capacity: Household Services (© 1993)
1817 Injury to Spouse: Future Loss of Earning Capacity: Household Services (© 2001)
1820 Injury to Spouse: Nursing Services: Past and Future (© 1992)
1825 Injury to Wife: Medical and Hospital Expenses [Withdrawn © 1995]
1830 Injury to Wife: Medical and Hospital Bills: Dispute over Ownership of Claim [Withdrawn © 1995]
1835 Injury to Minor Child: Parent's Damages for Loss of Child's Earnings and Services: Past and Future (© 2001)
1837 Injury to Minor Child: Parent's Damages for Loss of Society and Companionship (© 2001)
1838 Injury to Parent: Minor Child's Damages for Loss of Society and Companionship (© 2001)
1840 Injury to Minor Child: Parents' Damages for Medical Expenses: Past and Future (© 1996)
1845 Injury to Child: Parents' Damages for Services Rendered to Child: Past and Future (© 1992)
1850 Estate's Recovery for Medical, Hospital, and Funeral Expenses (© 2016)
1855 Estate's Recovery for Pain and Suffering (© 2018)

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1860 Death of Husband: Pecuniary Loss [Withdrawn © 1992]
1861 Death of Spouse (Domestic Partner): Pecuniary Loss (© 2010)
1865 Death of Wife: Pecuniary Loss [Withdrawn © 1992]
1870 Death of Spouse: Surviving Spouse's Loss of Society and Companionship (© 2019)
1875 Death of Spouse: Medical, Hospital, and Funeral Expenses (© 1992)
1880 Death of Parent: Pecuniary Loss (© 2016)
1885 Death of Adult Child: Pecuniary Loss (© 2001)
1890 Damages: Death of Minor Child: Premajority Pecuniary Loss (© 2001)
1892 Damages: Death of Minor Child: Postmajority Pecuniary Loss (© 2001)
1895 Death of Child: Parent's Loss of Society and Companionship (© 2019)
1897 Death of Parent: Child's Loss of Society and Companionship (© 2019)

Safe Place

1900.2 Safe-Place Statute: Duty of Employer (© 1992)
1900.4 Safe-Place Statute: Injury to Frequenter: Negligence of Employer or Owner of a Place of Employment (© 2020)
1901 Safe-Place Statute: Definition of Frequenter (© 1996)
1902 Safe-Place Statute: Negligence of Plaintiff Frequenter (© 2004)
1904 Safe-Place Statute: Public Buildings: Negligence of Owner (© 1990)
1910 Safe-Place Statute: Place of Employment: Business (© 1990)
1911 Safe-Place Statute: Control (© 1992)

Nuisance

1920 Nuisance: Law Note (© 2019)
1922 Private Nuisance: Negligent Conduct (© 2010)
1924 Private Nuisance: Abnormally Dangerous Activity: Strict Liability (© 2010)
1926 Private Nuisance: Intentional Conduct (© 2010)
1928 Public Nuisance: Negligent Conduct (© 2010)
1930 Public Nuisance: Abnormally Dangerous Activity: Strict Liability (© 2010)
1932 Public Nuisance: Intentional Conduct (© 2010)

INTENTIONAL TORTS

Assault and Battery

2000 Intentional Tort: Liability of Minor (© 2014)
2001 Intentional Versus Negligent Conduct (© 1995)

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2004 Assault (© 2011)
2005 Battery (© 2011)
2005.5 Battery: Offensive Bodily Contact (© 2015)
2006 Battery: Self-Defense (© 2013)
2006.2 Battery: Self-Defense; Defendant's Dwelling, Motor Vehicle, Place of Business; Wis. Stat. § 895.62 (© 2016)
2006.5 Battery: Defense of Property (© 2013)
2007 Battery: Liability of an Aider and Abettor (© 2011)
2008 Battery: Excessive Force in Arrest (© 2002)
2010 Assault and Battery: Offensive Bodily Contact [Renumbered JI-Civil- 2005.5 © 2011]
2020 Sports Injury: Reckless or Intentional Misconduct (© 2018)

False Imprisonment

2100 False Imprisonment: Definition (© 2014)
2110 False Imprisonment: Compensatory Damages (© 2014)
2115 False Arrest: Law Enforcement Officer; Without Warrant (© 1993)

Federal Civil Rights

2150 Federal Civil Rights: §§ 1981 and 1982 Actions (© 1993)
2151 Federal Civil Rights: § 1983 Actions (© 2014)
2155 Federal Civil Rights: Excessive Force in Arrest (in Maintaining Jail Security) (© 2014)

Conversion

2200 Conversion: Dispossession (© 2014)
2200.1 Conversion: Refusal to Return Upon Demand (Refusal by Bailee) (© 1993)
2200.2 Conversion: Destruction or Abuse of Property (© 1991)
2201 Conversion: Damages (© 2016)

Misrepresentation

2400 Misrepresentation: Bases for Liability and Damages - Law Note for Trial Judges (© 2018)
2401 Misrepresentation: Intentional Deceit (© 2018)
2402 Misrepresentation: Strict Responsibility (© 2018)
2403 Misrepresentation: Negligence (© 2018)

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2405 Intentional Misrepresentation: Measure of Damages in Actions Involving Sale [Exchange] of Property (Benefit of the Bargain) (© 2018)
2405.5 Strict Responsibility: Measure of Damages in Actions Involving Sale [Exchange] of Property (Benefit of the Bargain) (© 2018)
2406 Negligent Misrepresentation: Measure of Damages in Actions Involving Sale [Exchange] of Property (Out of Pocket Rule) (© 2014)
2418 Unfair Trade Practice: Untrue, Deceptive, or Misleading Representation: Wis. Stat. § 100.18(1) (© 2017)
2419 Property Loss Through Fraudulent Misrepresentation: Wis. Stat. § 895.446 (Based on Conduct (Fraud) Prohibited by Wis. Stat. § 943.20) (© 2018)
2420 Civil Theft: Wis. Stat. § 895.446 (Based on Conduct (Theft) Prohibited by Wis. Stat. § 943.20(1)(a)) (© 2019)

Defamation

2500 Defamation - Law Note for Trial Judges (© 2016)
2501 Defamation: Private Individual Versus Private Individual, No Privilege (© 2003)
2505 Defamation: Truth as a Defense (Nonmedia Defendant) (© 2014)
2505A Defamation: Truth of Statement (First Amendment Cases) (© 1989)
2507 Defamation: Private Individual Versus Private Individual with Conditional Privilege (© 2020)
2509 Defamation: Private Individual Versus Media Defendant (Negligent Standard) (© 2003)
2510 Defamation: Truth as Defense Where Plaintiff Charged with Commission of a Crime [Withdrawn © 1993]
2511 Defamation: Public Figure Versus Media Defendant or Private Figure with Constitutional Privilege (Actual Malice) (© 2003)
2512 Defamation: Truth as Defense Where Plaintiff Not Charged with Commission of a Crime [Withdrawn © 1993]
2513 Defamation: Express Malice (© 1993)
2514 Defamation: Effect of Defamatory Statement or Publication [Withdrawn © 1993]
2516 Defamation: Compensatory Damages (© 1991)
2517 Defamation: Conditional Privilege: Abuse of Privilege [Renumbered JI-Civil 2507 © 1993]
2517.5 Defamation: Public Official: Abuse of Privilege [Renumbered JI-Civil 2511 © 1993]
2518 Defamation: Express Malice [Renumbered JI-Civil 2513 © 1993]
2520 Defamation: Punitive Damages (© 2003)

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2550 Invasion of Privacy (Publication of a Private Matter) Wis. Stat. § 995.50(2)(c) (© 2015)
2551 Invasion of Privacy: Highly Offensive Intrusion; Wis. Stat. § 995.50(2)(a) (© 2011)
2552 Invasion of Privacy: Publication of a Private Matter: Conditional Privilege (© 2003)

Misuse of Procedure

2600 Malicious Prosecution: Instituting a Criminal Proceeding (© 2015)
2605 Malicious Prosecution: Instituting a Civil Proceeding (© 2015)
2610 Malicious Prosecution: Advice of Counsel: Affirmative Defense (Criminal Proceeding) (© 2015)
2611 Malicious Prosecution: Advice of Counsel: Affirmative Defense (Civil Proceeding) (© 2015)
2620 Abuse of Process (© 2013)

Trade Practices

2720 Home Improvement Practices Act Violation; Wisconsin Administrative Code Chapter ATCP 110; Wis. Stat. § 100.20 (© 2013)
2722 Theft by Contractor (Wis. Stat. § 779.02(5)) (© 2015)

Domestic Relations

2725 Intentional Infliction of Emotional Distress (© 2020)

Business Relations

2750 Employment Relations: Wrongful Discharge - Public Policy (© 2020)
2760 Bad Faith by Insurance Company (Excess Verdict Case) (© 2003)
2761 Bad Faith by Insurance Company: Assured's Claim (© 2012)
2762 Bad Faith by Insurance Company: Third Party Employee Claim Against Worker's Compensation Carrier [Withdrawn] (© 2009)
2769 Wisconsin Fair Dealership Law: Existence of Dealership (© 2020)
2770 Wisconsin Fair Dealership Law: Good Cause for Termination, Cancellation, Nonrenewal, Failure to Renew, or Substantial Change in Competitive Circumstances (Wis. Stat. § 135.03) (© 2005)
2771 Wisconsin Fair Dealership Law: Adequate Notice by Grantor (Wis. Stat. § 135.04) (© 2005)
2772 Wisconsin Fair Dealership Law: Special Verdict (© 2005)

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2780 Intentional Interference with Contractual Relationship (© 2020)
2790 Trade Name Infringement (© 2020)
2791 Trade Name Infringement: Damages (© 2010)

Civil Conspiracy

2800 Conspiracy: Defined (© 2018)
2802 Conspiracy: Proof of Membership (© 2003)
2804 Conspiracy: Indirect Proof (© 2003)
2806 Conspiracy to be Viewed as a Whole (© 1993)
2808 Conspiracy between Affiliated Corporations (© 2009)
2810 Conspiracy: Overt Acts (© 2003)
2820 Injury to Business: (Wis. Stat. § 134.01) (© 2008)
2822 Restraint of Will (Wis. Stat. § 134.01) (© 2003)

Tort Immunity

2900 Tort Immunity: Immunities Abrogated - Law Note for Trial Judges (© 1993)

CONTRACTS

General

3010 Agreement (© 2011)
3012 Offer: Making (© 1993)
3014 Offer: Acceptance (© 1993)
3016 Offer: Rejection (© 1993)
3018 Offer: Revocation (© 1993)
3020 Consideration (© 1993)
3022 Definiteness and Certainty (© 1993)
3024 Implied Contract: General (© 1993)
3026 Implied Contract: Promise to Pay Reasonable Value (© 1993)
3028 Contracts Implied in Law (Unjust Enrichment) (© 2020)
3030 Modification by Mutual Assent (© 1993)
3032 Modification by Conduct (© 1993)
3034 Novation (© 1993)
3040 Integration of Several Writings (© 1993)
3042 Partial Integration: Contract Partly Written, Partly Oral (© 1993)
3044 Implied Duty of Good Faith (Performance of Contract) (© 2007)
3045 Definitions - "Bona Fide" (© 1993)

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3046 Implied Promise of No Hindrance (© 1993)
3048 Time as an Element (© 2016)
3049 Duration (© 2016)
3050 Contracts: Subsequent Construction by Parties (© 1993)
3051 Contracts: Ambiguous Language (© 2012)
3052 Substantial Performance (© 1994)
3053 Breach of Contract (© 2007)
3054 Demand for Performance (© 2014)
3056 Sale of Goods: Delivery or Tender of Performance (© 1993)
3057 Waiver (© 2018)
3058 Waiver of Strict Performance (© 1993)
3060 Hindrance or Interference with Performance (© 1993)
3061 Impossibility: Original (© 1993)
3062 Impossibility: Supervening (© 1993)
3063 Impossibility: Partial (© 1993)
3064 Impossibility: Temporary (© 1993)
3065 Impossibility: Superior Authority (© 1993)
3066 Impossibility: Act of God (© 1993)
3067 Impossibility: Disability or Death of a Party (© 1993)
3068 Voidable Contracts: Duress, Fraud, Misrepresentation (© 2016)
3070 Frustration of Purpose (© 2020)
3072 Avoidance for Mutual Mistake of Fact (© 2014)
3074 Estoppel: Law Note for Trial Judges (© 2018)
3076 Contracts: Rescission for Nonperformance (© 2001)
3078 Abandonment: Mutual (© 1993)
3082 Termination of Servant's Employment: Indefinite Duration (© 1993)
3083 Termination of Servant's Employment: Employer's Dissatisfaction (© 1993)
3084 Termination of Servant's Employment: Additional Consideration Provided by Employee (© 1993)

Real Estate

3086 Real Estate Listing Contract: Validity: Performance (© 2019)
3088 Real Estate Listing Contract: Termination for Cause (© 1993)
3090 Real Estate Listing Contract: Broker's Commission on Sale Subsequent to Expiration of Contract Containing "Extension" Clause (© 1993)
3094 Residential Eviction: Possession of Premises (© 2020)
3095 Landlord - Tenant: Constructive Eviction (© 2013)

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TABLE OF CONTENTS

VOLUME III

CONTRACTS (Continued)

Insurance

3100 Insurance Contract: Misrepresentation or Breach of Affirmative Warranty by the Insured (© 1998)
3105 Insurance Contract: Failure of Condition or Breach of Promissory Warranty (© 1994)
3110 Insurance Contract: Definition of "Resident" or "Member of a Household" (© 2013)
3112 Owner's Permission for Use of Automobile (© 1993)
3115 Failure of Insured to Cooperate (© 2016)
3116 Failure to Cooperate: Materiality (© 2016)
3117 Failure to Give Notice to Insurer (© 1994)
3118 Failure to Give Notice to Insurer: Materiality (© 2002)

Breach of Warranty

3200 Products Liability: Law Note (© 2012)
3201 Implied Warranty: Merchantability Defined (© 2009)
3202 Implied Warranty: Fitness for Particular Purpose (© 1994)
3203 Implied Warranty: By Reason of Course of Dealing or Usage of Trade (© 1994)
3204 Implied Warranty: Sale of Food (© 1994)
3205 Implied Warranty: Exclusion or Modification (© 2009)
3206 Implied Warranty: Exclusion by Reason of Course of Dealing or Usage of Trade (© 1994)
3207 Implied Warranty: Use of Product after the Defect Known (© 2009)
3208 Implied Warranty: Failure to Examine Product (© 2009)
3209 Implied Warranty: Susceptibility or Allergy of User (© 2009)
3210 Implied Warranty: Improper Use (© 1994)
3211 Implied Warranty: Notice of Breach (© 1993)
3220 Express Warranty: General (© 1994)
3222 Express Warranty: No Duty of Inspection (© 1994)
3225 Express Warranty: Statement of Opinion (© 1994)
3230 Express Warranty under the Uniform Commercial Code (© 1994)

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Duties of Manufacturers and Sellers

3240 Negligence: Duty of Manufacturer (© 2007)
3242 Negligence: Duty of Manufacturer (Supplier) to Warn (© 2020)
3244 Negligence: Duty of Manufacturer (Seller) to Give Adequate Instructions as to Use of a Complicated Machine (Product) (© 1994)
3246 Negligence: Duty of Manufacturer (Seller) Who Undertakes to Give Instruction as to the Use of a Machine (Product) (© 1994)
3248 Negligence: Duty of Restaurant Operator in Sale of Food Containing Harmful Natural Ingredients (© 1994)
3250 Negligence: Duty of Seller: Installing (Servicing) Product (© 1994)
3254 Duty of Buyer or Consumer: Contributory Negligence (© 2015)
3260 Strict Liability: Duty of Manufacturer to Ultimate User (For Actions Commenced Before February 1, 2011) (© 2014)
3260.1 Product Liability: Wis. Stat. § 895.047 (For Actions Commenced after January 31, 2011) (© 2014)
3262 Strict Liability: Duty of Manufacturer (Supplier) to Warn (For Actions Commenced Before February 1, 2011) (© 2014)
3264 Strict Liability: Definition of Business (© 1994)
3268 Strict Liability: Contributory Negligence (© 2015)
3290 Strict Products Liability: Special Verdict (For Actions Commenced Before February 1, 2011) (© 2014)
3290.1 Product Liability: Wis. Stat. § 895.047: Verdict (For Actions Commenced after January 31, 2011) (© 2014)
3294 Risk Contribution: Negligence: Verdict (For Actions Commenced Before February 1, 2011) (© 2014)
3295 Risk Contribution: Negligence Claim (For Actions Commenced Before February 1, 2011) (© 2014)
3296 Risk Contribution: Negligence: Verdict (Wis. Stat. § 895.046) (For Actions Commenced after January 31, 2011) (© 2014)

Lemon Law

3300 Lemon Law Claim: Special Verdict (© 2016)
3301 Lemon Law Claim: Nonconformity (© 2001)
3302 Lemon Law Claim: Four Attempts to Repair: Same Nonconformity (© 1999)
3303 Lemon Law Claim: Out of Service Warranty Nonconformity (Warranty on or after March 1, 2014) (© 2016)
3304 Lemon Law Claim: Failure to Repair (Relating to Special Verdict Question 6) (© 2006)
3310 Magnuson–Moss Claim (© 2020)

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Damages

3700 Damages: Building Contracts: Measure of Damages (© 2012)
3710 Consequential Damages for Breach of Contract (© 2018)
3720 Damages: Incidental (© 1994)
3725 Damages: Future Profits (© 2008)
3735 Damages: Loss of Expectation (© 1994)
3740 Damages: Termination of Real Estate Listing Contract (Exclusive) by Seller; Broker's Recovery (© 1994)
3750 Damages: Breach of Contract by Purchaser (© 1994)
3755 Damages: Breach of Contract by Seller (© 1994)
3760 Damages: Attorney Fees (© 1994)

AGENCY; EMPLOYMENT; BUSINESS ORGANIZATION

4000 Agency: Definition (© 2019)
4001 General Agent: Definition (© 1994)
4002 Special Agent: Definition (© 1994)
4005 Agency: Apparent Authority (© 1994)
4010 Agency: Implied Authority (© 1994)
4015 Agency: Ratification (© 1994)
4020 Agent's Duties Owed to Principal (© 1994)
4025 Agency: Without Compensation (© 2005)
4027 Agency: Termination: General (© 1994)
4028 Agency: Termination: Notice to Third Parties (© 1994)
4030 Servant: Definition (© 2015)
4035 Servant: Scope of Employment (© 2016)
4040 Servant: Scope of Employment; Going to and from Place of Employment (© 2014)
4045 Servant: Scope of Employment While Traveling (© 1994)
4050 Servant: Master's Ratification of Wrongful Acts Done Outside Scope of Employment (© 1994)
4055 Servant: Vicarious Liability of Employer (© 2005)
4060 Independent Contractor: Definition (© 2005)
4080 Partnership (© 2009)

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PERSONS

5001 Paternity: Child of Unmarried Woman (© 2003)
7030 Child in Need of Protection or Services (© 2014)
7039 Involuntary Termination of Parental Rights: Child in Need of Protection or Services: Preliminary Instruction (© 2014)
7040 Involuntary Termination of Parental Rights: Continuing Need of Protection or Services (© 2014)
7042 Involuntary Termination of Parental Rights: Abandonment under Wis. Stat. § 48.415(1)(a) 2 or 3 (© 2014)
7050 Involuntary Commitment: Mentally Ill (© 2019)
7054 Petition for Guardianship of the Person: Incompetency; Wis. Stat. § 54.10(3)(a)2 (© 2019)
7055 Petition for Guardianship of the Estate: Incompetency; Wis. Stat. § 54.10(3)(a)3 (© 2009)
7056 Petition for Guardianship of the Estate: Spendthrift; Wis. Stat. § 54.10(2) (© 2009)
7060 Petition for Guardianship of Incompetent Person and Application for Protective Placement; Wis. Stat. § 54.10 and 55.08(1) (© 2019)
7061 Petition for Guardianship of Incompetent Person and Application for Protective Services; Wis. Stat. § 54.10 and 55.08(2) (© 2014)
7070 Involuntary Commitment: Habitual Lack of Self-Control as to the Use of Alcohol Beverages (© 2003)

PROPERTY

General

8012 Trespasser: Definition (© 2013)
8015 Consent of Possessor to Another's Being on Premises (© 2013)
8017 Duty of Hotelkeeper to Furnish Reasonably Safe Premises and Furniture for Guests (Renumbered JI-Civil 8051) (© 1994)
8020 Duty of Owner or Possessor of Real Property to Nontrespasser User (© 2013)
8025 Trespass: Owner's Duty to Trespasser; Duty to Child Trespasser (Attractive Nuisance) (© 2016)
8026 Trespass: Special Verdict (© 2016)
8027 Trespass: Child Trespasser (Attractive Nuisance): Special Verdict (© 2013)
8030 Duty of Owner of a Building Abutting on a Public Highway (© 2006)
8035 Highway or Sidewalk Defect or Insufficiency (© 2015)
8040 Duty of Owner of Place of Amusement: Common Law (© 1994)

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8045 Duty of a Proprietor of a Place of Business to Protect a Patron from Injury Caused by Act of Third Person (© 2012)
8050 Duty of Hotel Innkeeper: Providing Security (© 1994)
8051 Duty of Hotelkeeper to Furnish Reasonably Safe Premises and Furniture for Guests (© 1994)
8060 Adverse Possession Not Founded on Written Instrument (Wis. Stat. § 893.25) (© 2018)

Eminent Domain

8100 Eminent Domain: Fair Market Value (Total Taking) (© 2020)
8101 Eminent Domain: Fair Market Value (Partial Taking) (© 2012)
8102 Eminent Domain: Severance Damages (© 2008)
8103 Eminent Domain: Severance Damages: Cost-To-Cure (© 2007)
8104 Eminent Domain: Unity of Use - Two or More Parcels (© 2007)
8105 Eminent Domain: Lands Containing Marketable Materials (© 2008)
8107 Eminent Domain: Severance Damages; Unity of Use (© 2008)
8110 Eminent Domain: Change in Grade (© 2008)
8111 Eminent Domain: Access Rights (© 2020)
8112 Eminent Domain: Air Rights (© 2007)
8115 Eminent Domain: Special Benefits (© 2008)
8120 Eminent Domain: Comparable Sales Approach (© 2008)
8125 Eminent Domain: Inconvenience to Landowner [Withdrawn © 2008]
8130 Eminent Domain: Income Approach (© 2008)
8135 Eminent Domain: Cost Approach (© 2008)
8140 Eminent Domain: Legal Nonconforming Use, Lot or Structure (Definitions) (© 2007)
8145 Eminent Domain: Assemblage (© 2007)

Table of Cases Cited (© 2020)
Index (© 2020)

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1 RIGHT TO A JURY TRIAL: LAW NOTE FOR TRIAL JUDGES

INTRODUCTION

The right to a jury trial does not exist in all civil actions. The purpose of this note is to assist trial courts in determining whether a civil litigant has a constitutional right to a jury trial. The note examines common law and statutory claims. Article I, Section 5 of the Wisconsin Constitution governs a civil litigant's right to a jury trial in a Wisconsin court.

That constitutional section states: "the right of trial by jury shall remain inviolate and shall extend to all cases at law." This provision guarantees the right to a civil jury trial as the right existed at the time our state's constitution was adopted in 1848.

RIGHT TO A JURY TRIAL IN EQUITABLE ACTIONS

The right to a trial by jury does not exist in equitable actions. In an equitable action, all the issues, whether legal or equitable, are triable by the court.[1] The merger of law and equity has not abolished the difference between legal and equitable remedies. In an equitable action a litigant has never been held entitled to a jury trial as a matter of right.[2]

The trial court in an action in equity may submit questions of fact to an advisory jury. The trial court is required to find facts necessary for a party to have judgment and is free to disregard the jury's findings. Failure of a trial court to make its own findings is prejudicial error.[3]

The issues triable by the court in an equitable action include counterclaims or other legal responses submitted by the defendant.[4] However, the waiver of jury does not apply to a compulsory legal counterclaim asserted by defendant in an equitable suit.[5] A counterclaim is compulsory if it arises out of the transaction or occurrence that is the subject of the action and it is lost if not asserted.

CLASSIFYING CASES AS LEGAL OR EQUITABLE

Classification of cases as legal or equitable is based on two types of criteria. The first criteria is whether the relief is coercive in nature. Examples of coercive remedies include injunction, attachment, receivership, and other remedies which can be both provisional or permanent. These types of remedies are equitable remedies. Equitable remedies of this type

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include a coercive *in personam* order directing the defendant to act in a certain way and are enforceable by contempt. Dobbs Law of Remedies (2nd edition) §1.4, p. 16.

The second criteria for equitable classification is historical. Under this approach, "a claim could be deemed equitable if the plaintiff sought to enforce a right that was originally created in equity courts, or a right that was traditionally decided according to equitable principles." Dobbs Law of Remedies (2nd edition) §2.6(3) p. 155. Examples of historical equity actions are the law of mortgages, trusts, divorces, fiduciary, and confidential relationships. Other examples are claims for rescission and restitution.[6]

Modern legal pleadings can assert multiple claims which include both legal and equitable claims. The trial court can analyze and manage these claims in the following suggested ways:

1. **Clean up or incidental authority**: A plaintiff who joins both legal or equitable claims or a defendant who files a legal claim in an equity suit waives a right to a jury trial. Under clean up or incidental authority, the trial court determines both the legal and equitable issues. A party who voluntarily submits a claim in equity takes an equity trial even as to legal claims. This approach is efficient as it avoids a multiplicity of suits. Dobbs Law of Remedies (2nd edition) §2.6(4) pp. 169-170.

2. **Primary focus of case**: In this approach, a court examines whether the gist or primary point of the case is equitable. If so, then the whole case including the legal issue is tried to the court. Dobbs, supra, at page 169.

3. **Severance of legal and equitable claims**: The trial court can sever the claims and try them separately. If the court tries the equity claim first, the equity decision will create issue preclusion on any facts the legal and equitable claims have in common. In cases where equitable relief depends on whether a legal right was first established, the cases can be severed and the legal claim can be tried to a jury. Alternatively, the claims can be tried together and the jury's verdict can be accepted as binding on both the legal and equitable issues. Dobbs, supra, at page 170.

STATUTORY CLAIMS

Claims created by statute require an analysis of the constitutional right to a jury trial. If the legislature includes a provision for trial by jury in the statute, litigants are entitled to a jury trial for any claim at law.[7] If the statute is silent with regard to the right to jury trial,

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no jury trial is required unless the right is preserved by Article I, section 5 of the Wisconsin Constitution.[8]

In Village Food & Liquor v. H&S Petroleum, Inc., 254 Wis.2d 478, 484, 647 N.W.2d 177 (2002), the Wisconsin Supreme Court stated:

> ...consistent with our prior case law, we conclude that a party has a constitutional right to have a statutory claim tried to a jury when:
>
> (1) the cause of action created by the statute existed, was known, or was recognized at common law at the time of the adoption of the Wisconsin Constitution in 1848 and
>
> (2) the action was regarded at law in 1848.

The application of part (1) of the test to particular causes of an action has lacked a unanimous consensus.[9]

In Village Food, supra, the supreme court concluded that the plaintiff was entitled to a jury trial for alleged violation of the minimum mark up statute. The majority determined that the mark up laws were "of the same nature" as the common law crimes of forestalling the market, regrating, and engrossing found in Blackstone's Commentaries on the Law of England. The majority rejected a rigid test of requiring statutory causes of action to codify common law causes of action in a form substantially similar. Instead, the majority opted for a broader test requiring that the modern statutory claim be analogous to a common law claim or essentially a counterpart to a known common law claim.

In State v. Schweda, 303 Wis.2d 353, 736 N.W.2d 49 (2007), the supreme court refused to grant a jury trial in a case involving alleged violations of waste disposal regulations. The defendants premised their right to a jury trial on analogous common law nuisance claims. The court concluded that the analogy between nuisance law and modern environmental regulatory law was not precise enough to establish that part (1) of the Village Food test had been met.

In Harvot v. Solo Cup, 320 Wis.2d 1, 768 N.W.2d 176 (2009), a majority of the supreme court refused to permit a jury trial in an action under the Family Medical Leave Act. The statute again was silent on the jury trial issue. The majority opinion concluded that the Family Medical Leave Act was not a counterpart to a cause of action existing in 1848 because there was no common purpose with any common law cause of action. No common law claim existed in 1848 designed to protect employees while on leave to care for their medical needs or those of their families.

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In State of Wisconsin v. Abbott Laboratories, 341 Wis.2d 510, 816 N.W.2d 145 (2012), the State sued various pharmaceutical companies alleging violations of the Deceptive Trade Practices Act (DTPA) and the Medicaid fraud statute. The supreme court affirmed the right to a jury trial under both statutes. Applying the Village Food test, the court's decision concluded that the DTPA claims were an essential counterpart to the common law claim of "cheating." The claim shared a similar purpose of combatting deceptive commercial conduct. As to the Medicaid fraud claim, the court concluded that that statute counterpart was the common law claim of fraud. The similar purpose was to protect the integrity of business relationships and market transactions.

Determining whether the first part of the Village Food & Liquor test has been met for a jury trial on a statutory claim is difficult. The committee believes the following five criteria should be considered to determine if the first part of the test has been met:

- Does the statute codify common law causes of action in a form substantially similar to causes of action that existed in 1848? If so, the first test is met.

- Is the modern day statutory claim sufficiently analogous to a known common law claim? Considerations here include whether the statutory claim is: of the same nature as the common law claim, similar to the common law claim, or essentially a counterpart to a known common law claim.

- The purpose of the statute should be examined. If the purpose of the statute does not share a purpose with an 1848 common law action, then the first test is not met.

- The court should examine the analogy to the common law claim. The analogy must be precise and cannot be vague, general or amorphous.

- Statutes which deal with prohibited deception or fraud are likely to be sufficiently analogous to common law fraud to meet the first test. The purpose of protecting the market place from business misconduct is a common denominator.

The second part of the Village Food & Liquor test is whether the claim was regarded at law in 1848. Equitable claims do not meet the test. The discussion in "**CLASSIFYING CASES AS LEGAL OR EQUITABLE**" section of this Law Note on determining whether a claim is legal or equitable should be consulted for help in resolving this issue.

NOTES:

1. In Neff v. Barber, 165 Wis. 503, 162 N.W. 667 (1917), a derivative claim was brought by a stockholder and creditor of a company alleging conspiracy and mismanagement. The case was tried to the

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court who found no conspiracy and no mismanagement. On appeal, the plaintiff claimed the issue of conspiracy was a legal issue entitling him to a jury trial as a matter of right. The supreme court disagreed stating:

> He admits that the action was one in equity, but claims, nevertheless, the absolute right to a jury trial of the issue of law presented by the charge of conspiracy. That the right to a trial by jury does not extend to equitable actions is too well settled in our jurisprudence to be now successfully questioned. Harrigan v. Gilchrist, 121 Wis. 127, 281, 282, 99 N.W. 909. In an action in equity all the issues, whether legal or equitable, are triable by the court. In its discretion an advisory verdict upon any or all of the issues may be taken, but neither party is entitled thereto as a matter of right, much less to a verdict having the force of one in an action at law. (emphasis supplied)

2. In Spensley Feeds v. Livingston Feed & Lumber, Inc., 128 Wis.2d 279, 381 N.W.2d 601 (1985), the trial court tried an action to a jury involving the applicability of the statute of frauds to a land transaction. Because this was an equitable action, the court of appeals found error and reversed stating:

> Although the distinctions between actions at law and suits in equity have long been abolished, the differences between legal and equitable remedies continue. Miller v. Joannes, 262 Wis. 425, 428, 55 N.W.2d 375, 376 (1952). The right to trial by jury under Wis. Const. art. 1, sec 5, does not extend to "equity cases, in which the party has never been held entitled to a jury trial as a matter of right." Stilwell v. Kellogg, 14 Wis. 499[461], 503 [464] (1861).
>
> In all equitable actions, the case must be tried by the court, and, before judgment can be entered, the court must find that all the facts necessary to entitle the plaintiff to a judgment have been established by the evidence. Stahl v. Gotzenberger, 45 Wis. 121, 123 (1878), quoted with approval in Dombrowski v. Tomasino, 27 Wis.2d 378, 385, 134 N.W.2d 420, 424 (1965). The trial court made no findings or conclusion regarding any of the equitable exceptions in sec. 706.04(1)-(3), Stats.
>
> The trial court in an action in equity may, of course, on the motion of a party or its own motion, submit questions of fact to an advisory jury. Jolin v. Oster, 55 Wis.2d 199, 205, 198 N.W.2d 639, 642 (1972); sec. 805.02(1), Stats.
>
> Nothing in the record indicates that the trial court considered the verdict as advisory. Nor did the verdict determine which, if any, of the equitable exceptions in sec. 706.04, Stats., is applicable. For those reasons, the error was prejudicial.

3. Spensley Feeds v. Livingston Feed and Lumber, Inc., Ibid.

4. Mortgage Associates v. Monona Shores, 47 Wis.2d 171, 176-177, 177 N.W.2d 340 (1969); Zabel v. Zabel, 210 Wis.2d 336, 344-345, 565 N.W.2d 240 (1997).

5. Green Spring Farms v. Spring Green Farms, 172 Wis.2d 28, 492 N.W.2d 392 (Ct. App. 1992).

6. Dobbs Law of Remedies (2nd edition) Vol 1, §2.6 (3) pp. 162-163. Zabel v. Zabel, 210 Wis.2d 336, 345, 565 N.W.2d 240 (1997); Zastrow v. Journal Communications, Inc. 291 Wis.2d 426, 442, 718 N.W.2d 51 (2006).

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7. Bekkedal v. City of Viroqua, 183 Wis.2d 176, 192, 197 N.W. 707 (1924); Stillwell v. Kellogg, 14 Wis. 499 (1861); Harvot v. Solo Cup, 320 Wis.2d 1, 20, 768 N.W.2d 176 (2009); Village Food & Liquor, supra, page 486.

8. Harvot, supra, page 20.

9. State v. Schweda, 303 Wis.2d 353, 363, 736 N.W.2d 49 (2007).

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10 SUGGESTED ORDER OF INSTRUCTIONS: NEGLIGENCE CASES

Instruction	Subject
50	Preliminary Instruction: Before Trial [If used (discretionary), they are to be given after jury selection and before opening statements.]
100	Opening
110	Remarks and Arguments of Counsel
115	Objections of Counsel
120	Ignoring Judge's Demeanor
130	Stricken Testimony
215	Credibility of Witnesses; Weight of Evidence
260	Expert Testimony: General
265	Expert Testimony: Hypothetical Questions
145	Special Verdict Questions: Interrelationship
200	Burden of Proof: Ordinary

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Instruction	Subject
1005	Negligence Defined
1500	Read the cause question(s) of the verdict; then read 1500
1580	Comparative Negligence
1700	Damages: General Read the damage questions and instruct after each question is read using the applicable damage instructions (JI-Civil 1705-1897).
180	Five-Sixths Verdict
190 or 191	Closing
195	Supplemental Instruction Where Jury is Unable to Agree (If appropriate)
197	Charge After Verdict is Received

COMMENT

This suggested order of instructions was initially approved by the Committee in 1981 and revised in 1982, 1991, 2000, 2010, and 2018. The comment was revised by the Committee in 1982, 2010, and 2018.

There is no hard and fast rule concerning the order in which instructions are to be given. One order may be more preferable to one judge or to fit a particular case than another. In any event, it is recommended that instructions involving various subjects, such as appropriate witness instructions, should be given at one time during the charge and not piecemeal throughout the charge.

In cases not involving a question of negligence, the order can conform to the above order with modifications to accommodate the nature of the case and burden of proof.

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50 PRELIMINARY INSTRUCTION: BEFORE TRIAL

(NOTE TO THE TRIAL JUDGE: The following is a suggested instruction to be given to the jury before opening statements are made by the lawyers for the parties. While most of this instruction should apply to most cases, some parts of it do not apply to all cases and some parts of it may not apply to the case before you now. Read the instruction before it is given and delete any parts that are not applicable. Also, the language used in this Instruction is "suggested" language. You may have another way of expressing the same ideas in this instruction and may do so, consistent with Wisconsin law.)

MEMBERS OF THE JURY:

Before the trial begins, there are certain instructions you should have to better understand your functions as a juror and how you should conduct yourself during the trial.

Your duty is to decide the case based only on the evidence presented at trial and the law given to you by the court. Anything you may see or hear outside the courtroom is not evidence. Do not let any personal feelings about race, religion, national origin, sex, or age affect your consideration of the evidence.

In fairness to the parties, keep an open mind during the trial. Do not begin your deliberations and discussion of the case until all the evidence is presented and I have instructed you on the law. Do not discuss this case among yourselves or with anyone else until your final deliberations in the jury room. This order is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic devices, such as a mobile phone or computer, text or instant messaging, or social networking sites, to send or receive any information about this case or your

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experience as a juror. Once deliberations begin in the jury room you will then be in a position to intelligently and fairly exchange your views with other jurors.

CONDUCT

We will stop, or "recess," from time to time during the trial. You may be excused from the courtroom when it is necessary for me to hear legal arguments from the lawyers. If you come in contact with the parties, lawyers (interpreters) or witnesses do not speak with them. For their part, the parties, lawyers, (interpreters) and witnesses will not contact or speak with the jurors. Do not listen to any conversation about this case.

Do not research any information that you personally think might be helpful to you in understanding the issues presented. Do not investigate this case on your own or visit the scene, either in person or by any electronic means. Do not read any newspaper reports or listen to any news reports on radio, television, over the internet, or any other electronic application or tool about this trial. Do not consult dictionaries, computers, electronic applications, social media, the internet, or other reference materials for additional information. Do not seek information regarding the public records of any party or witness in this case. Any information you obtain outside the courtroom could be misleading, inaccurate, or incomplete. Relying on this information is unfair because the parties would not have the opportunity to refute, explain, or correct it.

Do not communicate with anyone about this trial or your experience as a juror while you are serving on this jury. Do not use a computer, cell phone or other electronic device, including personal wearable electronics, applications, or tools with communication capabilities to share any information about this case. For example, do

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not communicate by telephone, blog post, e-mail, text message, instant message, social media post, or in any other way, on or off the computer.

Do not permit anyone to communicate with you about this matter, either in person, electronically, or by any other means. If anyone does so despite your telling them not to, you should report that to me. I appreciate that it is tempting when you go home in the evening to discuss this case with another member of your household, but you may not do so. This case must be decided by you the jurors, based on the evidence presented in the courtroom. People not serving on this jury have not heard the evidence, and it is improper for them to influence your deliberations and decision in this case. After this trial is completed, you are free to communicate with anyone in any manner.

These rules are intended to assure that jurors remain impartial throughout the trial. If any juror has reason to believe that another juror has violated these rules, you should report that to me. If jurors do not comply with these rules, it could result in a new trial involving additional time and significant expense to the parties and the taxpayers.

PARTIES

A party who brings a lawsuit is called a plaintiff. In this case, the plaintiff[s] [is] [are] _____ [state separately as to each if more than one]. The plaintiff[s] [is] [are] suing to [note: state purposes of the action for each plaintiff, for example, recover damages from a defendant].

[If there are multiple plaintiffs, give the following: You should decide the case of each plaintiff as if it were a separate lawsuit. Each plaintiff is entitled to separate consideration of [his] [her] [its] own claim(s). All instructions apply to each plaintiff unless I tell you otherwise.]

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A party against whom a claim is made is called a defendant. In this case, the defendant[s] [is] [are] _____ [state separately to each if more than one].

[If there are multiple defendants, give the following: You should decide the case against each defendant as if it were a separate lawsuit. Each defendant is entitled to separate consideration of [his] [her] [its] own defenses. All instructions apply to each defendant unless I tell you otherwise.]

[If there is a counterclaiming defendant, give the following: The defendant[s] in this case have also filed a claim against the plaintiff[s]. [Identify the party making the counterclaim and the party against whom the counterclaim is made]. The claim of a defendant against a plaintiff is called a counterclaim. The defendant[s] [is] [are] counterclaiming for [note: state purposes of the counterclaim for each defendant, for example, recover damages from a plaintiff.]

[If there are parties with subrogated interests or other parties named in caption and not appearing at trial, give the following: There [is another party] [are other parties] named in this case that will not participate in this trial. Do not speculate on the reasons. Any claims involving them are not to be considered by you in deciding this case.]

[If there are settled, dismissed, or withdrawn parties, give the following: [Former party] is no longer a party in this case. [The claims of that party] [Claims against that party] have been [settled] [dismissed] [withdrawn]. Do not speculate on the reasons.]

EVIDENCE

You are to decide the case solely on the evidence offered and received at trial.

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Evidence is:

1. testimony of witnesses given in court, both on direct and cross-examination, regardless of who called the witness;
2. deposition testimony presented during the trial;
3. exhibits admitted by me regardless of whether they go to the jury room; and
4. any facts to which the lawyers have agreed or stipulated or which I have directed you to find.

Anything you may have seen or heard outside the courtroom is not evidence.

Remarks of the attorneys are not evidence. If any remarks suggest certain facts not in evidence, disregard the suggestion.

ORDER OF PROOF

Normally, a plaintiff will produce all witnesses and exhibits supporting plaintiff's claim against the defendant before the defendant introduces any evidence, although exceptions are sometimes made to that rule to accommodate a witness. After the plaintiff's case is presented, the defendant may present witnesses and exhibits to establish any defenses. There is no requirement that the defendant call any witnesses or present any evidence [unless the defendant is making a claim against the plaintiff]. If the defendant does introduce evidence, the plaintiff is then permitted to offer additional evidence to rebut the defendant's case. Each witness is first examined by the lawyer who called the witness to testify and then the opposing lawyer is permitted to cross-examine.

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OBJECTIONS

At times during a trial, objections may be made to the introduction of evidence. I do not permit arguments on objections to evidence to be made in your presence. Any ruling upon objections will be based solely upon the law and are not matters which should concern you at all. You must not infer from any ruling that I make or from anything that I should say during the trial that I hold any views for or against either party to this lawsuit.

During the trial, I will sustain objections to questions asked without permitting the witness to answer or, where an answer has been made, will instruct that it be stricken from the record and that you are to disregard it and dismiss it from your minds. You should not draw any inference from an unanswered question, nor may you consider testimony which has been stricken in reaching your decision. This is because the law requires that your decision be made solely upon the competent evidence before you.

[**NOTETAKING NOT ALLOWED**

Do not take notes during the trial. Taking notes will not be permitted in this case because _____.]

[**NOTETAKING PERMITTED**

You are not required to but you may take notes during this trial, except during the opening statements and closing arguments. The court will provide you with materials.

In taking notes, you must be careful that it does not distract you from carefully listening to and observing the witnesses.

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You may rely on your notes to refresh your memory during your deliberations. Otherwise, keep them confidential. After the trial, the notes will be collected and destroyed.]

TRANSCRIPTS NOT AVAILABLE FOR DELIBERATIONS; READING BACK TESTIMONY

You will not have a copy of the written transcript of the trial testimony available for use during your deliberations. [You may ask to have specific portions of the testimony read to you.] You should pay careful attention to all the testimony because you must rely primarily on your memory of the evidence and testimony introduced during the trial.

USE OF DEPOSITIONS

During the trial, the lawyers will often refer to and read from depositions. Depositions are transcripts of testimony taken before the trial. The testimony may be that of a party or anybody who has knowledge of facts relating to the lawsuit. Deposition testimony, just like testimony during the trial, if received into evidence at the trial, may be considered by you along with the other evidence in reaching your verdict in this case.

[JUROR QUESTIONING OF WITNESSES

You will be given the opportunity to ask written questions of the witnesses testifying in this case.

After both lawyers have finished questioning a witness, you may raise your hand if you have any questions that have not been addressed by the lawyers. Questions must be in writing and directed to the witness and not to the lawyers or me. If I determine that

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your question may be asked, I will ask it. If I do not ask your question, you should not speculate what the answer to the question is or why I did not ask it.]

CREDIBILITY OF WITNESSES

It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.

In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors:

- whether the witness has an interest or lack of interest in the result of this trial;
- the witness' conduct, appearance, and demeanor on the witness stand;
- the clearness or lack of clearness of the witness' recollections;
- the opportunity the witness had for observing and for knowing the matters the witness testified about;
- the reasonableness of the witness' testimony;
- the apparent intelligence of the witness;
- bias or prejudice, if any has been shown;
- possible motives for falsifying testimony; and
- all other facts and circumstances during the trial which tend either to support or to discredit the testimony.

Then give to the testimony of each witness the weight you believe it should receive.

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There is no magic way for you to evaluate the testimony; instead, you should use your common sense and experience. In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same thing here.

BURDEN OF PROOF

In every trial there is a burden of proof. The phrase "burden of proof" means that when a party comes into a courtroom and makes a claim, as the plaintiff is making here, the law says that claim must be proved. After the trial, I will instruct you on the proper burden of proof to be applied to the questions in the verdict that will be submitted to you.

[CLOSING ARGUMENTS

After all of the evidence is introduced and both parties have rested, the lawyers will again have an opportunity to address you in a closing argument. While the closing arguments are very important, they are not evidence and you are not bound by the argument of either lawyer.

After the final arguments are concluded, I will instruct you on the rules of law applicable to the case, and you will then retire for your deliberations. Your function as jurors is to determine what the facts are and to apply the rules of law that I give you to the facts. The conclusion you reach will be your verdict. You will determine what the facts are from all the testimony that you hear and from exhibits that are submitted to you. You are the sole and exclusive judges of the facts. In that field, neither I nor anyone may invade your province. I will try to preside impartially during this trial and not to express any opinion concerning the facts. Any views of mine as to what the facts are are totally irrelevant.

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I do caution you, however, that under your oath as jurors, you are duty bound to accept the rules of law that I give you whether you agree with them or not. As the sole judges of the facts in this case, you must determine which of the witnesses you believe, what portion of their testimony you accept, and what weight you attach to it.]

OPENING STATEMENTS

We have now reached that stage of the proceedings where both lawyers have the opportunity to make an opening statement.

The purpose of an opening statement is to outline for you what each side expects to prove so that you will better understand the evidence as it is introduced during the trial. I must caution you, however, that the opening statements are not evidence.

After [counsel/the parties] have completed their opening statements, we will begin the trial, by (plaintiff)'s lawyer calling the first witness.

COMMENT

This instruction was approved in 2010, and revised in 2017 to include a "Note to the Trial Judge" at the beginning of the instruction. This revision was approved by the Committee in January 2020; it expanded on the use of social media and other digital tools.

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57 JUROR QUESTIONING OF WITNESSES

You will be given the opportunity to submit written questions for the witnesses called to testify in this case. You are not encouraged to submit large numbers of questions because questioning witnesses is primarily the responsibility of counsel. Questions may be submitted only in the following manner.

After both lawyers have finished questioning a witness, and only at this time, if there are additional questions you would like the witness to answer you may then submit a written question for that witness. If you want to submit a question, simply raise your hand and the bailiff will collect your written question. Questions must be directed to the witness and not to the lawyers or the judge. After consulting with counsel, I will determine if your question is legally proper. If I determine that your question may properly be asked, I will ask it. If I do not allow a particular question to be asked, do not guess about what the answer might have been. Do not draw any conclusion from the fact that a question was not asked.

COMMENT

Wis JI-Civil 57 was originally approved in 2001 and revised in 2010 and 2013. The revision in 2013 adopted Wis JI-Criminal 57 and the commentary by the Criminal Jury Instructions Committee.

This instruction is provided as a possible guide for those judges who wish to allow jury questioning of witnesses during trial. Questions to the judge from jurors during deliberations raise different issues.

There is no specific statutory or case law authority in Wisconsin requiring or prohibiting juror questioning of witnesses. The only appellate decision to consider the issue is State v. Darcy N. K., 218 Wis.2d 640, 581 N.W.2d 567 (Ct. App. 1998), where the court found that the failure to allow juror questions did not prejudice the defendant. This part of the decision is consistent with the conclusion that trial courts have implied or inherent authority to allow juror questioning. See § 906.11: "The judge shall exercise reasonable control over the mode and order of interrogating witnesses. . . ." The court also concluded that when juror questions are allowed, "a trial court should employ safeguards recommended by the Criminal Jury Instructions Committee." The court's decision incorporated Section III. Recommended Procedures if Questions are Allowed and Section IV. Jury Instructions from Special Material 8 Juror Questioning Of Witnesses [c. 1992].

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The discussion below was taken from the commentary to Wis JI-Criminal 57. It is a revision of material originally published by the Criminal Jury Instructions Committee in *Wis JI-Criminal* Special Materials 8 (SM-8).

Advantages and Disadvantages of Juror Questioning

a. **Advantages**
   i. Allows jurors to resolve issues that are important to them.
   ii. Brings out relevant material the lawyers missed.
   iii. Aids jury deliberations by reducing the number of uninformed jurors or resolving questions in the courtroom that would prolong or distract deliberations.
   iv. Increases juror attentiveness.
   v. Increases juror satisfaction; decreases frustration and discontent.
   vi. Helps lawyers direct their cases toward the issues jurors are concerned about.
   vii. Promotes compliance with the admonition that jurors are not to do research on their own.

b. **Disadvantages**
   i. Disrupts trial strategy of the lawyers who intentionally left a question unasked.
   ii. Jurors anticipate where the case is going and jump ahead of the lawyers.
   iii. Makes jurors less impartial and more partisan.
   iv. Questions may be to the disadvantage of clients.
   v. Disrupts or delays courtroom procedure and order.

If a trial court decides to allow juror questions, notice should be given to counsel. If counsel objects, proceeding with juror questions should be supported by findings on the record.

Recommended Procedures if Questions are Allowed

There appears to be consensus on the basic procedures to be followed if juror questions are allowed. The major aspects are as follows:

a. Whether to allow questions lies within the judge's discretion.
b. Jurors should be given preliminary instructions advising them of the right to submit questions and explaining the procedure to be used.
c. After a witness is interrogated by counsel, but before the witness leaves the stand, the jurors are asked if they have any questions.
d. Questions are submitted in writing to the judge and are shown to the lawyers, who may object without the jury knowing of it.
e. The judge reviews the questions and any objections.
f. If the judge sustains the objection, the jury is advised that questions cannot be asked.
g. If the judge overrules the objection, the judge asks the question.
h. Lawyers are allowed to follow up on issues raised by juror questions.
i. Make a record of the juror questions submitted and asked.

Jury Instructions

If the jury is to be allowed to ask questions, a preliminary instruction telling the jury about the procedure ought to be given. Thus, the content of the instruction is dependent upon the type of procedure that is adopted.

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60 NOTETAKING NOT ALLOWED

Do not take notes during the trial. You may not take notes because:

_____

_____

_____

COMMENT

This instruction and comment were approved by the Committee in 1984. The instruction was revised in 2010. The comment was reviewed without change in 1989.

If notetaking is not allowed, the court must state the reasons for the determination on the record. See Wis. Stat. § 805.13(2), quoted in full in the Comment, Wis JI-Civil 61.

The stating of reasons need not be done in the presence of the jury, but it is probably a good practice to tell the jurors why they are not being allowed to take notes.

See supreme court rationale in Fischer v. Fischer, 31 Wis.2d 293, 304, 142 N.W.2d 857 (1965).

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61 NOTETAKING PERMITTED

You may take notes during the trial, except during the opening statements and closing arguments. Court personnel will give you writing materials.

Be careful that notetaking does not distract you from carefully listening to and observing witnesses.

You may rely on your notes during your deliberations. Otherwise, keep them confidential. Court personnel will collect and destroy any notes after the trial.

COMMENT

This instruction and comment were approved in 1984 and revised in 2005 and 2010.

This instruction implements Wis. Stat. § 805.13(2), as amended by Chapter 358, Laws of 1981:

> (2) Preliminary instructions and notetaking.
> (a) After the trial jury is sworn, the court shall determine if the jurors may take notes of the proceedings:
>
> 1. If the court authorizes notetaking, the court shall instruct the jurors that they may make written notes of the proceedings, except the opening statements and closing arguments, if they so desire and that the court will provide materials for that purpose if they so request. The court shall stress the confidentiality of the notes to the jurors. The jurors may refer to their notes during the proceedings and deliberation. The notes may not be the basis for or the object of any motion by any party. After the jury has rendered its verdict, the court shall ensure that the notes are promptly collected and destroyed.
>
> 2. If the court does not authorize notetaking, the court shall state the reasons for the determination on the record.
>
> (b) The court may give additional preliminary instructions to the jury which instructions may again be given in the charge at the close of the evidence.

Under the statute, the court must decide whether the jury should be allowed to take notes. The only Wisconsin decision discussing notetaking preceded the statute by several years, see Fischer v. Fischer, 31 Wis.2d 293, 142 N.W.2d 857 (1965).

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63 TRANSCRIPTS NOT AVAILABLE FOR DELIBERATIONS; READING BACK TESTIMONY

You will not have a written transcript of the trial testimony to use during your deliberations. [You may ask to have specific portions of the testimony read to you.] You should pay careful attention to all the testimony because you must rely on your memory of the testimony and evidence when you are deliberating.

COMMENT

This instruction was approved in 2003 and revised in 2010. For suggestions on using this instruction, see the commentary to Wis. JI-Criminal 58.

In some cases, the trial judge may want to add the following: "You may ask to have specific portions of the testimony read to you."

This is not intended to encourage jury requests for the rereading of testimony. However, the jury does have a right to have testimony read. The extent is within the discretion of the trial judge. State v. Cooper, 4 Wis.2d 251, 253-54, 89 N.W.2d 816 (1958).

The judge may choose to summarize the testimony in lieu of having it read. Salladay v. Town of Dodgeville, 85 Wis. 318, 323, 55 N.W. 696 (1893). But the Wisconsin Supreme Court has indicated that it may be "the far better practice" to have the testimony read back. Kohloff v. State, 85 Wis.2d 148, 160, 270 N.W.2d 63 (1978). For other cases applying these standards, see State v. Tarrell, 74 Wis.2d 647, 659, 247 N.W.2d 696 (1976); and Jones v. State, 70 Wis.2d 41, 57-58, 233 N.W.2d 430 (1975).

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65 PRELIMINARY INSTRUCTION: USE OF AN INTERPRETER FOR A WITNESS

No matter what language people speak, they have the right to have their testimony heard and understood. During this trial an interpreter will translate for one or more of the witnesses. The interpreter is required to remain neutral. The interpreter is required to translate between English and [insert appropriate other language] accurately.

You must base your decision on the evidence presented in the English translation. Although some of you may know the non-English language used, it is important that all jurors consider the same evidence. You must disregard any different meaning of the non-English words.

You must not give interpreted testimony any greater or lesser weight than you would if the witness had spoken English.

ADD THE FOLLOWING IF APPROPRIATE:

[Keep in mind that a person might speak some English without speaking it fluently. That person has the right to the services of an interpreter. Therefore, you shall not give greater or lesser weight to a person's translated testimony based on your conclusions, if any, regarding the extent to which that person speaks English.]

COMMENT

This instruction was approved in 2003 and revised in 2010. It is based on Wis. JI-Criminal 60. This committee concludes this instruction covers a party if the party testifies.

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66 PRELIMINARY INSTRUCTION: USE OF AN INTERPRETER FOR A JUROR

One of the jurors requires help from an interpreter. The role of the interpreter is to provide communications assistance, so that the juror can hear the evidence and participate effectively in jury deliberations. An interpreter must interpret truly, accurately, completely, and impartially. An interpreter may not offer any opinion on the proceedings, or ask any questions, or participate in the jury's deliberations. An interpreter may not disclose or comment upon anything that happens in jury deliberations unless ordered to do so by me. During the deliberations, address the juror directly and speak as freely as if an interpreter was not there. Please do not engage the interpreter in conversation, except to speak with the juror.

COMMENT

This instruction was approved in 2003 and revised in 2010. It is based on Wis. JI-Criminal 61.

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80 RECORDING PLAYED TO THE JURY

You are about to (hear an audio recording) (hear and view an audiovisual recording). Recordings are evidence and you may consider them, just as any other evidence. Listen carefully; some parts may be hard to understand.

[You may consider the actions of a person, facial expressions, and lip movements that you can observe on videotapes to help you to determine what was actually said and who said it.]

[You will be provided a transcript to help you listen to the recording. If you notice any difference between what you heard on the recordings and what you read in the transcript(s), you must rely on what you heard, not what you read.]

COMMENT

This instruction was approved by the Committee in 2010. It is based on Wis JI-Criminal 158.

This draft was based on an instruction adapted from The Pattern Jury Instructions for the 7th Circuit, 3.17. [Available online at http://www.ca7.uscourts.gov/Pattern_Jury_Instr/pjury.pdf.]

Effective January 1, 2010, SCR 71.01 (2) is amended to create new subsection (e):

(2) All proceedings in the circuit court shall be reported, except for the following:

. . .

(e) Audio recordings of any type that are played during the proceeding, marked as an exhibit, and offered into evidence. If only part of the recording is played in court, the part played shall be precisely identified in the record.

In the Matter of Amendment of Supreme Court Rule 71.01 Regarding Required Reporting of Court Proceedings. 2009 WI 104

If the jury requests that a recording be played back during jury deliberations, see State v. Anderson, 2006 WI 77, ¶¶30-31, 291 Wis.2d 673, 717 N.W.2d 74: the jury should return to the courtroom and the recording should be played for the jury in open court.

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100 OPENING

Members of the jury, (this case) (these cases) will now be submitted to you in the form of a special verdict consisting of _____ questions. Your duty is to answer those questions which, according to the evidence and my instructions, it becomes necessary for you to answer to arrive at a completed verdict. It then becomes my duty to direct judgment according to law and according to the facts as you have found them.

Evidence is defined as follows:

1. testimony of witnesses given in court, both on direct and cross-examination, regardless of who called the witness;
2. deposition testimony presented during the trial;
3. exhibits admitted by me regardless of whether they go to the jury room; and
4. any facts to which the lawyers have agreed or stipulated or which I have directed you to find.

Anything you may have seen or heard outside the courtroom is not evidence. You are to decide the case solely on the evidence offered and received at trial. You are to be guided by my instructions and your own sound judgment in considering the evidence in (this case) (these cases) and in answering these questions.

You should not concern yourselves about whether your answers will be favorable to one party or to the other nor with what the final result of this lawsuit may be.

COMMENT

This instruction was originally approved in 1960 and revised in 1984, 1986, 1996, and 2000. The comment was revised in 1984, 1986, 1996, 2000, and 2012.

The special verdict is authorized by Wis. Stat. § 805.12; the five-sixths verdict by § 805.09(2).

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The issue of telling the jury the effect of its findings is one that has frequently been discussed by the Wisconsin Supreme Court. Cases on this issue date back to at least 1890. Throughout the years, the court has not deviated from the position that it is improper for a trial judge to tell the jury the effect of its verdict. In Anderson v. Seelow, 224 Wis. 230, 271 N.W. 844 (1937), the court said:

> . . . . The sole purpose of a special verdict is to get the jury to answer each question according to the evidence, regardless of the effect or supposed effect of the answer upon the rights of the parties as to recovery. To inform them of the effect of their answer in this respect is to frustrate this purpose. . . .

Similarly, in Blahnik v. Dax, 22 Wis.2d 67, 125 N.W.2d 364 (1963), the court held that a jury should not be instructed as to the effect of the apportionment of negligence upon the jury award. The court stated:

> We have consistently held that, "'[i]t is reversible error for the trial court by instruction to the jury to inform the jury expressly or by necessary implication of the effect of an answer or answers to a question or questions of the special verdict upon the ultimate right of either party litigant to recover or upon the ultimate liability of either party litigant.'" To instruct the jury on the effect of its apportionment of negligence upon the ultimate recovery would be such an error.
>
> Our holding is based on the fundamental separation of the questions in the special verdict on the issues of liability from those of damages. If the trier is persuaded that a preponderance, however narrowly, favors a finding of negligence, he is then to award the full damages proved. The trier of fact is not to discount damages because of his view of the degree of fault in the defendant's conduct. Conversely, he is not to increase damages because the defendant's conduct was especially wanton and irresponsible. Neither is the trier of fact to temper his findings as to negligence by any consideration of the extent of the damages suffered.

In McGowan v. Story, 70 Wis.2d 189, 234 N.W.2d 325 (1975), the court was asked to alter this position in cases involving the comparative negligence law. In its decision, the court recognized that "where multiple parties are involved the effect of a jury's apportionment of negligence and the impact of the comparison of negligence between negligent tortfeasors can be complex indeed." Although it recognized this inherent problem, the court refused to allow the jury to be instructed on the effect of Wis. Stat. § 895.045 on its verdict. It stated:

> Under our system of jurisprudence, the jury is the finder of fact and it has no function in determining how the law should be applied to the facts found. It is not the function of a jury in a case between private parties on the determination of comparative negligence to be influenced by sympathy for either party, nor should it attempt to manipulate the apportionment of negligence to achieve a result that may seem socially desirable to a single juror or to a group of jurors.
>
> Moreover, under the Wisconsin comparative negligence law, where multiple parties are involved the effect of a jury's apportionment of negligence between negligent tortfeasors can be complex indeed. It is occasionally apparent that these

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> complexities are not understood by lawyers and try the deliberative faculties of judges.
>
> While we recognize the validity of the problem posed by the plaintiff, there is no evidence that the remedy of advising a jury of the effect of its answers would not result in jury confusion and create a situation more to be deplored than that which presently exists.
>
> We suggest that the jury should be admonished, and impressed, that its function in a negligence case is fact-finding only and that it is not its role to usurp the legislative function under the comparative negligence law or the judicial function in interpreting the comparative negligence law. It is the role of the judge, acting under the law, and not the jury, to implement the general policies of the comparative negligence statute. We decline to consider the change in the jury function proposed by the plaintiff.

The most recent expression of the court's position on this issue is set forth in Delvaux v. Vanden Langenberg, 130 Wis.2d 464, 387 N.W.2d 430 (1986). On appeal, the plaintiffs argued that failing to inform the jury of the ultimate legal effect of its verdict "blindfolds" the jury. Further, the plaintiffs argued that "it is basically unfair to litigants to have some juries which, by virtue of a knowledgeable juror or jurors, are appraised of the legal effect of the verdict, while other juries, without the benefit of a legally knowledgeable juror, are left to reach a verdict without the knowledge of its ultimate legal effect."

The supreme court rejected these arguments, stating:

> Plaintiffs' arguments overlook the function given to juries in this jurisdiction and ignore case precedent. The members of the jury are not to concern themselves about whether the verdict answers will be favorable to one party or to the other party, nor should a jury be concerned "with what the final result of [the] lawsuit may be." Wis JI-Civil No. 100. Olson v. Williams, 270 Wis. 57, 71, 70 N.W.2d 10 (1955). The jury is a finder of fact; its charge does not include its applying the relevant law to the facts of the case, which is the function of the court. Indeed, the law applicable to a given set of facts is irrelevant to the function of finding those facts; to instruct the jury on matters irrelevant to its charge would disserve the jury's proper task and enlarge the scope of the jury's function beyond that of fact finder.
>
> If it is true, as plaintiffs assert, that some juries will be knowledgeable about the ultimate effect of their verdicts while other juries will not be — thereby arguably subjecting a litigant's success or demise to the happenstance constituency of a particular jury — then the solution is to more emphatically instruct the members of a jury that its sole function is strictly that of fact finder. See McGowan v. Story, 70 Wis.2d 189, 198-99, 234 N.W.2d 325 (1975). To inform all juries of the effect of a special verdict in comparative negligence cases solely in the interest of uniformity of knowledge merely substitutes one problem for another. Informing a jury of the verdict's legal effect enlarges the function of the jury well beyond that of fact finder and into the domain of the court. It is the duty of the jury to find the facts and the duty and domain of the court to determine the legal rights of the parties after the

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return of the verdict. Vanderbloemen v. Suchosky, 7 Wis.2d 367, 374, 97 N.W.2d 183 (1959); see also McGowan, 70 Wis.2d at 199.

For further cases which discuss advising the jury of the effects of its verdict, see Shawver v. Roberts Corp., 90 Wis.2d 672, 280 N.W.2d 226 (1979); McGowan v. Story, supra at 196; Vanderbloemen v. Suchosky, 7 Wis.2d 367, 373, 97 N.W.2d 183 (1959); Bailey v. Bach, 257 Wis. 604, 608, 610, 44 N.W.2d 631, 634 (1950); Nelson v. Pauli, 176 Wis. 1, 11, 186 N.W. 217, 221 (1922).

Instructions to the jury can be given by the court either before or after closing arguments of counsel. Wis. Stat. § 805.13(4).

Exhibits. The reference to exhibits in the instruction serves as a cautionary note to jurors so they do not disregard exhibits that were admitted into evidence but were not allowed in the jury room. For an instruction when a summary exhibit has been used, see Wis JI-Civil 103.

Taking care not to comment on the evidence, a judge may choose to inform the jury which exhibits have been admitted and which have not.

The decision on whether to allow exhibits in the jury room has long been recognized as being a matter of trial court discretion. Milwaukee Tank Works v. Metals Coating Co., 196 Wis. 191, 194, N.W. (1928), Wunderlich v. Palatine Fire Ins. Co., 104 Wis. 382, 80 N.W. 467 (1899). But note the language of Payne v. State, 199 Wis. 615, 629-30, 227 N.W. 258 (1929), the court stated, in part:

> While it is held that the matter of permitting exhibits to be taken to the jury room is a matter resting within the discretion of the trial court (cite omitted), attention should be paid to the nature of the exhibits. Generally there could be no harm in permitting a jury to refresh its memory with reference to the contents of a written instrument by an examination of the instrument. Where, however, the testimony bearing on one side of a controversy is in the form of a deposition or other written statement, and the testimony on the other resting entirely on parole evidence given in court, it is obvious that to permit a jury to take the written portion of the testimony to the jury room, compelling them to rely on their memories for the testimony on the other side, gives one side of the controversy an undue advantage, and it would seem plain that such exhibits should not be permitted to be taken to the jury room. 2 Thompson, Trials (2d ed) § 2578.

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103 SUMMARY EXHIBIT

The court has allowed the use of a chart to organize the evidence and to assist you in understanding it. The chart is a summary of some of the evidence that was presented. However, it is the evidence that controls. You should rely on the chart only to the extent that you believe it accurately and properly summarizes the evidence.

[ADD THE FOLLOWING IF THE SUMMARY WAS NOT ADMITTED INTO EVIDENCE: The chart itself is not evidence.]

COMMENT

This instruction was approved in 2012. See also Wis JI-Criminal 154.

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106 SUBMISSION ON GENERAL VERDICT

Two forms of verdict will be submitted to you. Only one of them will be returned as your verdict. The verdict numbered 1, which reads as follows, will, if returned by you, be a verdict in favor of plaintiff and against the defendant.

[Read Verdict No. 1.]

The verdict numbered 2, which reads as follows, will, if returned by you, be a verdict in favor of the defendant and against the plaintiff.

[Read Verdict No. 2.]

SUGGESTED FORMS OF VERDICTS FOLLOW:

Verdict No. 1
We, the jury, find in favor of the plaintiff, _____, and assess damages at _____.
Dated: _____.

_____
Presiding Juror

Dissenters: _____
_____

Verdict No. 2
We, the jury, find in favor of the defendant, _____.
Dated: _____.

_____
Presiding Juror

Dissenters: _____
_____

COMMENT

This instruction was approved by the Committee in 1962 and reviewed without change in 2010. The comment was revised in 1991 and 2010.

See Wis. Stat. § 805.12(1). The special verdict is the rule and not the exception in Wisconsin practice. Milwaukee & Suburban Transp. Corp. v. Milwaukee County, 82 Wis.2d 420, 263 N.W.2d 503 (1978). A party who desires the general verdict form must request the court to order the use of the general verdict.

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107 SUBMISSION ON ULTIMATE FACT VERDICT

Instruction Withdrawn.

COMMENT

This instruction was approved in 1962 and withdrawn in 2010.

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108 SUBMISSION ON ULTIMATE FACT VERDICT WHEN COURT FINDS ONE OR MORE PARTIES AT FAULT

Instruction withdrawn.

COMMENT

This instruction was withdrawn in 2010.

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110 REMARKS AND ARGUMENTS OF COUNSEL

Remarks of the attorneys are not evidence. If any remarks suggested certain facts not in evidence, disregard the suggestion.

You should consider carefully the closing arguments of the attorneys, but their arguments, conclusions, and opinions are not evidence. Draw your own conclusions and your own inferences from the evidence and answer the questions in the verdict according to the evidence and my instructions on the law.

COMMENT

The instruction and comment were originally published in 1960. The comment was updated in 1980. The instruction was revised in 1985, 1991, and 2010.

Mullen v. Reinig, 72 Wis. 388, 392, 39 N.W. 861, 862-63 (1888); Merco Distrib. Corp. v. O. & R. Engines, Inc., 71 Wis.2d 792, 239 N.W.2d 97 (1976). See also Kenwood Equip., Inc. v. Aetna Ins. Co., 48 Wis.2d 472, 180 N.W.2d 750 (1970).

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115 OBJECTIONS OF COUNSEL

The lawyers for the parties have a duty to object to what they feel are improper questions. Do not draw any conclusion for either side if an objection was made to a question and the witness was not permitted to answer.

COMMENT

The instruction and comment were originally published in 1960. The instruction was revised in 1985, 1991, and 2010. The comment was updated in 2015.

Frion v. Craig, 274 Wis. 550, 557, 80 N.W.2d 808, 812 (1957); Johnson v. Cintas Corp. No. 2., Appeal No. 2013AP2323 (Recommended for publication).

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120 IGNORING JUDGE'S DEMEANOR

If any member of the jury has an impression that I have an opinion one way or another in this case, disregard that impression entirely and decide the issues solely as you view the evidence. You, the jury, are the sole judges of the facts, and the court is the judge of the law only.

COMMENT

The instruction was originally published in 1960 and revised in 1985, 1991, 2004, and 2010.

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125 COUNSEL'S REFERENCE TO INSURANCE COMPANY

You have heard references to an insurance company. The title to this case includes an insurance company. However, the special verdict does not contain a question about insurance. This is because there is no dispute concerning insurance. Whether (defendant) is liable for damages is the same, whether or not (defendant) is insured. Under your oath as jurors, you are bound to be impartial toward all parties. You should answer the questions in the verdict the way you would if there was no insurance company in the case.

COMMENT

The instruction was originally published in 1960 and revised in 1991, 2005, and 2010. The comment was updated in 1980. The comment was reviewed without change in 1989 and 2005.

Nimmer v. Purtell, 69 Wis.2d 21, 230 N.W.2d 258 (1975).

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130 STRICKEN TESTIMONY

I ordered certain testimony to be stricken during the trial. Disregard all stricken testimony and do not let it affect your answers to the verdict questions.

COMMENT

The instruction was published in 1972 and revised in 2004 and 2010.

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145 SPECIAL VERDICT QUESTIONS: INTERRELATIONSHIP

Some questions in the verdict are to be answered only if you have answered a preceding question in a certain manner. It is important for you to read the introductory portion of each question carefully before you answer it. Do not answer questions you are not required to answer.

COMMENT

This instruction was originally approved by the Committee in 1972 and was revised in 1985, 2004, and 2010. The comment was updated in 1982 and 2016.

Prefatory instructions to a special verdict question which instruct the jury not to answer the question unless it has answered a previous question in a certain manner do not violate the rule against informing the jury of the effect of its answers. Papenfus v. Shell Oil Co., 254 Wis. 233, 238, 35 N.W.2d 920, 923 (1949); John A. Decker and John R. Decker, "Special Verdict Formulation in Wisconsin," 60 Marq. L. Rev. 201 (1977). For medical negligence verdict questions, see Wis JI-Civil 1023 (Comment).

The form of a special verdict is discretionary with the trial court. A reviewing court will not interfere as long as material issues of fact are encompassed within the questions and appropriate instructions are given. Meurer v. ITT General Controls, 90 Wis.2d 438, 280 N.W.2d 156 (1979); Murray v. Holiday Rambler, Inc., 83 Wis.2d 406 265 N.W.2d 513 (1978).

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150 DAMAGE QUESTION ANSWERED BY THE COURT

I have answered several parts of the damage question(s) in the verdict.

These answers are not an admission of liability by any party or a finding of liability by me.

I have answered these questions because the answers to these questions are not in dispute. My answers have no bearing on what your answers should be to the other parts of these questions or to any other question in the verdict.

COMMENT

This instruction wás approved by the Committee in 1972 and revised in 1985 and 2004.

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152 VIEW OF SCENE

We are visiting (describe where) to help you understand and weigh evidence that will be introduced during the trial. What you will see today is not evidence and should not be considered by you as evidence. During the trip or while we are at the scene, do not discuss this case or what you see with anyone. Only I or someone at my direction may talk to you.

Stay with the other jurors during the trip. Do not conduct an independent investigation of (describe where) today or at any time during the trial.

COMMENT

This instruction and comment were approved in 2000 and revised in 2010.

Wis. Stat. § 805.08(4) forms the statutory basis for this instruction:

> On motion of any party, the jury may be taken to view any property, matter or thing relating to the controversy between the parties when it appears to the court that the view is necessary to a just decision. The moving party shall pay the expenses of the view. The expenses shall afterward be taxed like other legal costs if the party who incurred them prevails in the action. (Emphasis supplied.)

Whether or not a view is to be conducted is within the discretion of the trial judge. See American Family Mut. Ins. Co. v. Shannon, 120 Wis.2d 560, 567-569, 356 N.W.2d 175 (1984), where the Wisconsin Supreme Court stated that the court may initiate the view on its own motion in a jury case and may conduct a view in a civil nonjury case, after notice to the parties with opportunity for them to be present at the view. The lawyers, a reporter, and the parties — if their lawyers so request — should be present. In that nonjury case, the trial judge took a view on his own at the close of the evidence without notifying the parties of his intention to do so. The court found his action was error requiring a new trial.

The "view" is for the purpose of enabling the trier of fact to "better understand, correctly weigh, and assess the respective credibility of the evidence. American Family Mut. Ins. v. Shannon, supra, at 568. It is not considered as evidence independent of that produced during the trial.

As to the second paragraph, see Sasse v. State, 68 Wis. 530, 537, 32 N.W. 849 (1887).

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155 QUESTION ANSWERED BY THE COURT

I have answered question No.____ because (there is no dispute as to the answer) (the attorneys have agreed to the answer.) My answer does not have any bearing on the answer to any other question on the verdict.

COMMENT

This instruction was approved by the Committee in 1972. The instruction was revised in 1985 and 2010.

The supreme court advises giving this instruction. Reyes v. Lawry, 33 Wis.2d 112, 146 N.W.2d 510 (1966). Failure to give it may not, however, be error. Reyes, supra; Schmit v. Sekach, 29 Wis.2d 281, 291, 139 N.W.2d 88 (1966).

Approved in Crowder v. Milwaukee & Suburban Transp. Corp., 34 Wis.2d 499, 508-09, 159 N.W.2d 723 (1968).

Only affirmative, not negative, answers by the court as to negligence should be included in the special verdict. Neuman v. Evans, 272 Wis. 579, 76 N.W.2d 322 (1956).

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180 FIVE-SIXTHS VERDICT

Agreement by ten (five) or more jurors is sufficient to become your verdict. Jurors have a duty to consult with one another and deliberate for the purpose of reaching agreement. If you can do so consistently with your duty as a juror, at least the same ten (five) jurors should agree in all the answers. I ask you to be unanimous if you can.

At the bottom of the verdict, you will find a place provided where dissenting jurors, if there be any, will sign their names and state the answer or answers (the number of the verdict question(s)) with which they do not agree. Either the blank lines or the space below them may be used for that purpose.

COMMENT

This instruction was approved by the Committee in 1974 and revised in 1984, 2003, and 2010. The comment was revised in 1984, 1986, 1988, 1991, 2010 and 2017. The language of this instruction is also incorporated in Wis JI-Civil 191.

Wis. Stat. § 805.09(2).

Wis. Stat. § 805.09(2) does not require that five-sixths of the jury agree on all questions in the verdict. Rather, five-sixths must agree on all questions necessary to support a judgment on a particular claim. Therefore, a verdict must be reviewed on a claim-by-claim basis. Geise v. Montgomery Ward, Inc., 111 Wis.2d 392, 400, 331 N.W.2d 585 (1983).

Multiple Claims. When instructing the jury in cases involving multiple claims, see In Interest of C.E.W., 124 Wis.2d 47, 368 N.W.2d 47 (1985). In that decision, the court said it was error to give this instruction in a case involving six verdict forms because the instruction's language that "at least the same ten jurors should concur in all the answers made" gives the jury the belief that the same jurors must make the same decision on all verdicts. The court said that the six verdicts were independent, and, therefore, there was no reason for the trial court to impose the requirement of unanimity across verdicts.

Other cases dealing with five-sixths rule: Scipior v. Shea, 252 Wis. 185, 31 N.W.2d 189 (1948); Vogt v. Chicago, M., St. P. & P. R.R., 35 Wis.2d 716, 151 N.W.2d 713 (1967); Krueger v. Winters, 37 Wis.2d 204, 155 N.W.2d 1 (1967); Lorbecki v. King, 49 Wis.2d 463, 182 N.W.2d 226 (1971).

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The practice of providing a place at the end of the verdict for dissenting jurors to sign their names and indicate the numbers of the questions to which the dissents relate was approved in Kowalke v. Farmers Mut. Auto Ins. Co., 3 Wis.2d 389, 403, 88 N.W.2d 747, 754-55 (1958); in this case, only two signature lines were provided, but there was space below the lines for additional signatures. It is error for counsel in closing argument to "lure jurors into the belief that a verdict agreed to by less than five-sixths of their number is one that can be received by the court." Lievrouw v. Roth, 157 Wis.2d 332, 459 N.W.2d 850 (Ct. App. 1990). Thus, the trial counsel in Lievrouw was not permitted to argue that although only two spaces were designated in the verdict for dissenting jurors that did "not mean that only two of you (jurors) can dissent" and that "[if] six of you feel one way and six of you feel the other way — ." Lievrouw, supra at 360.

The supplemental instruction to be used after the jury has reported its inability to agree is Wis JI-Civil 195.

If the jury returns a verdict which is defective because there are too many dissenters, the judge may direct the jury to return to the jury room with appropriate instructions and to reconsider their answers. Bensend v. Harper, 2 Wis.2d 474, 478, 87 N.W.2d 258 (1958); Husting v. Dietzen, 224 Wis. 639, 272 N.W. 851 (1937); Jackson v. Robert L. Reisinger & Co., 219 Wis. 535, 263 N.W. 641 (1935).

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190 CLOSING: SHORT FORM

Now, members of the jury, this case is ready to be submitted to you for your serious deliberation. You will consider the case fairly, honestly, impartially, and in the light of reason and common sense. Give each question in the verdict your careful and conscientious consideration. In answering each question, free your minds of all feelings of sympathy, bias, or prejudice. Let your verdict speak the truth, whatever the truth may be.

When you retire to the jury room, your first duty will be to elect a juror, who will preside over your deliberations and write in the answers you have agreed upon. The vote of the presiding juror, however, is entitled to no greater weight than the vote of any other juror. When your deliberations are concluded, and your answers inserted in the verdict, the presiding juror will sign and date the verdict, and all of you will return with the verdict into the court.

The clerk may now swear the bailiffs.

COMMENT

The instruction and comment were originally published in 1960. The instruction was revised in 1985 and 1991. A longer alternative to this instruction, Wis JI-Civil 191, was approved in 2010.

See Dick v. Heisler, 184 Wis. 77, 83-87, 198 N.W. 734, 736-38 (1924).

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191 CLOSING: LONG FORM

Now, members of the jury, this case is ready to be submitted to you for your serious deliberation. You are free to deliberate in any way you wish consistent with your oath as jurors, but these suggestions may help you proceed in a smooth and timely way.

I would remind you to follow the instructions about the law. Respect each other's opinions and value the different viewpoints you each bring to the case. Listen to one another and be respectful of each other's opinions. Do not be afraid to change your opinion if you are convinced by the reasoning of your fellow jurors. Be thoughtful and do not rush. The parties to this case deserve your complete attention and consideration.

Selecting the Presiding Juror

When you retire to the jury room, select one of your members to preside over your deliberations. That person's vote is entitled to no greater weight than the vote of any other juror. The presiding juror should:

- Encourage discussions that include all jurors.
- Keep the deliberations focused on the evidence and the law.
- Let the court know when there are any questions or problems.
- Tell the court when a verdict has been reached.

Discussing the Evidence and the Law

I will send written copies of the instructions to the jury room for you to refer to during deliberations. It is a violation of the juror's oath not to follow the instructions, to refuse to deliberate, or to rely on any information outside of the evidence.

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I remind you that you may not bring into the jury room any research materials or additional information; this includes dictionaries, computers, electronic communication devices, or other reference materials. You may not communicate in any way with anyone other than jurors until you have reached your verdict.

Getting Assistance from the Court

You will not have a copy of a written transcript of the trial testimony available for use during your deliberations. You must rely primarily on your memory of the evidence and testimony introduced during the trial. You may ask to have specific portions of the testimony read to you, but you may not receive everything you ask for or you may receive more than you ask for.

[If you wish to see an exhibit, you may ask for it. I will respond by either sending the exhibit to you or by sending back a note that I cannot send you that particular exhibit. If I do not send you the exhibit, do not concern yourselves about the reason why I have not done so.]

If you need to communicate with me while you are deliberating, send a note through the bailiff, signed by the presiding juror. To have a complete record of this trial, it is important that you not communicate with me except by a written note.

If you have questions, I will talk with the attorneys before I answer so it may take some time. You should continue your deliberations while you wait for my answer. I will answer any questions in writing or orally here in open court.

Do not reveal to me or anyone else how the vote stands on the issues in this case unless I ask you to do so.

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Reaching a Verdict

Agreement by ten (five) or more jurors is sufficient to become the verdict of the jury. Jurors have a duty to consult with one another and deliberate for the purpose of reaching agreement. If you can do so consistently with your duty as a juror, at least the same ten (five) jurors should agree in all the answers. I ask you to be unanimous if you can.

At the bottom of the verdict, you will find a place provided where dissenting jurors, if there be any, will sign their names and state the answer or answers with which they do not agree. Either the blank lines or the space below them may be used for that purpose.

After you have reached a verdict, the following steps will be followed:

- The presiding juror tells the bailiff that a verdict has been reached.
- The judge calls everyone, including you, back into the courtroom.
- The verdict is read into the record in open court.
- I may ask for an individual poll of each of you to see if you agree with the verdict. You need only answer "yes" or "no" to the question.

Members of the jury, you will consider the case fairly, honestly, impartially, and in the light of reason and common sense. Give each question in the verdict your careful and conscientious consideration. In answering each question, free your minds of all feelings of sympathy, bias, or prejudice. Let your verdict speak the truth, whatever the truth may be.

The clerk may now swear the bailiffs.

COMMENT

The instruction was approved in 2010 and revised in 2011 and 2016. It is an alternative to Wis JI-Civil 190. The comment was revised in 2017.

See Wis JI-Civil 180.

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Wis. Stat. § 805.09(2) does not require that five-sixths of the jury agree on all questions in the verdict. Rather, five-sixths must agree on all questions necessary to support a judgment on a particular claim. Therefore, a verdict must be reviewed on a claim-by-claim basis. Geise v. Montgomery Ward, Inc., 111 Wis.2d 392, 400, 331 N.W.2d 585 (1983).

Multiple Claims. When instructing the jury in cases involving multiple claims, see In Interest of C.E.W., 124 Wis.2d 47, 368 N.W.2d 47 (1985). In that decision, the court said it was error to give this instruction in a case involving six verdict forms because the instruction's language that "at least the same ten jurors should concur in all the answers made" gives the jury the belief that the same jurors must make the same decision on all verdicts. The court said that the six verdicts were independent, and, therefore, there was no reason for the trial court to impose the requirement of unanimity across verdicts.

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195 SUPPLEMENTAL INSTRUCTION WHERE THE JURY IS UNABLE TO AGREE

The court has been informed that the jury is unable to agree on a verdict. You are not going to be kept here until you do agree, but you jurors are as competent to agree on a verdict as the next jury that may be called to hear the same evidence and arguments that you have heard.

You do not have to violate your individual judgment and conscience. However, you do have the duty to be open-minded to discuss the evidence freely and fairly, to listen to the arguments of your fellow jurors, and to examine your own position and to make a conscientious effort to agree on a verdict.

Remember, agreement by ten (five) or more jurors is sufficient to become the verdict of the jury. [If you can do so consistently with your duty as a juror, at least the same ten (five) should agree in all the answers (as to a particular claim).] If possible, I ask you to be unanimous.

At the bottom of the verdict, you will find a place provided where dissenting jurors, if there be any, will sign their name or names and state the answer or answers with which they do not agree. Either the blank lines or the space below them may be used for that purpose.

COMMENT

The instruction was originally published in 1972 and revised in 1991 and 2002. The comment was updated in 1980 and was reviewed in 2002 without change.

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Wis. Stat. § 805.13(5).

Kelley v. State, 51 Wis.2d 641, 645, 187 N.W.2d 810 (1971). See also Lewandowski v. Continental Casualty Co., 88 Wis.2d 271, 282, 276 N.W.2d 284 (1979).

It is not error to permit a civil jury to separate at night and return the next morning to continue deliberations. Annot., 77 A.L.R.2d 1086 (1961).

For reinstruction of the jury, see Hareng v. Blanke, 90 Wis.2d 158, 279 N.W.2d 437 (1979).

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197 INSTRUCTION AFTER VERDICT IS RECEIVED

Your service in this case is completed. Many jurors ask if they are allowed to discuss the case with others after receipt of the verdict. Because your role in the case is over, you are not prohibited from discussing the case with anyone. However, you should know that you do not have to discuss the case with anyone or answer any questions about it from anyone other than the court. This includes the parties, lawyers, the media, or anyone else.

If you do decide to discuss the case with anyone, I would suggest you treat any discussion with a degree of solemnity such that whatever you do say, you would be willing to say in the presence of your fellow jurors or under oath here in open court in the presence of the parties. It is in the public interest that there be the utmost freedom of debate in the jury room and that jurors be permitted to express their views without fear of incurring the anger of any litigants or criticism of any person. Please respect the privacy of the views of your fellow jurors.

Finally, should any of you have questions for the court before leaving today, please let the bailiff know before you leave the jury room. You may confer with me at any time before answering any questions asked by anyone.

COMMENT

The instruction and comment were originally approved in 1972. The instruction was revised in 1995 and 2010.

The instruction is strongly recommended, but its use is not mandatory. It may be appropriate in cases where the jury might find it helpful to be advised by the court that it is solely their decision whether to discuss their jury service with others.

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200 BURDEN OF PROOF: ORDINARY

Certain questions in the verdict ask that you answer the questions "yes" or "no". The party who wants you to answer the questions "yes" has the burden of proof as to those questions. This burden is to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that "yes" should be your answer to the verdict questions.

The greater weight of the credible evidence means that the evidence in favor of a "yes" answer has more convincing power than the evidence opposed to it. Credible evidence means evidence you believe in light of reason and common sense.

"Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof.

COMMENT

This instruction was approved in 1972 and revised in 1989, 1991, 2000, and 2002. The instruction was reviewed without change in 2003. The comment was updated in 1982, 1985, 1986, 1988, 1989, 1991, 2000, 2001, and 2002.

In 2002, the Committee reviewed the standard civil burden of proof instructions following the decision of the supreme court in Nommensen v. American Continental Insurance Co., 2001 WI 112, 246 Wis.2d 132, 629 N.W.2d 301. The Committee is mindful of a number of suggestions made by the supreme court in Nommensen. From that case, we glean the following:

(1) The two element approach (the greater weight standard and the reasonable certainty standard) should not be abandoned. ¶ 4.

(2) The term, "the greater weight of the credible evidence," is understandable by the average juror. ¶ 16.

(3) The term, "reasonable certainty" has been firmly established in our case law. ¶ 26.

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(4) Substituting "reasonable probability" for "reasonable certainty" would be inconsistent with precedent and is not the solution here. ¶ 56.

(5) A jury should first consider the greater weight standard, then apply the reasonable certainty standard. ¶ 27.

(6) The revision should separate the two elements. ¶ 57.

Our revision in 2002 endeavors to satisfy the guidelines set out in Nommensen.

Nommensen was a medical malpractice action. When the plaintiff filed proposed jury instructions, he asked the trial judge to replace the word "certainty" with the word "probability" in Wis JI-Civil 200, Burden of Proof: Ordinary. The trial judge declined to do so and charged the jury with Wis JI-Civil 200 without modification.

On appeal, the plaintiff, who had failed to establish causation, argued that the trial judge erroneously instructed the jury when it gave the standard jury instruction although he concluded the instruction correctly sets out current Wisconsin authority. The court of appeals affirmed the use of the instruction without modification, but said it was bound by precedent. A concurring opinion criticized the current instruction and urged the supreme court to reevaluate the use of the phrase "reasonable certainty."

The supreme court affirmed the trial judge's use of Wis JI-Civil 200. Its opinion contains the following passages:

- We think the Wisconsin Civil Jury Instructions Committee was standing on solid ground when it commented that "The Committee believes the term 'reasonable certainty' has been firmly established in our case law and accurately reflects the degree of certitude jurors must reach in answering verdict questions." Wis JI-Civil 200 cmt . . .

- We disagree with the criticism that "reasonable certainty" is not firmly established in our case law, or that it is not well supported by the cases that adopted it. Reasonable certainty is one of the two essential elements of the ordinary burden of proof in this state . . .

- Another of Nommensen's proposals–to eliminate discussion of the degree of certitude altogether–runs contrary to well-established case law . . . This idea of Nommensen's does not square with this state's long-standing two-element approach to the burden of proof. The Wisconsin Civil Jury Instructions Committee also has expressly rejected this proposal. Accordingly, we decline to rewrite instruction 200 in the manner proposed by Nommensen . . .

- We have carefully considered petitioner's argument that there is potential for juror confusion in Wis JI-Civil 200, with respect to the elements of degree of certitude and

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quantum of evidence. With this in mind, we respectfully request the Wisconsin Civil Jury Instructions Committee to revisit the instruction for a thorough review . . .

- Changing "reasonable certainty" to "reasonable probability" in the instruction is not the proper tonic for potential juror confusion and would be inconsistent with precedent. However, we concur with Nommensen that instruction 200 as written is deserving of a thorough review. Such a review should consider all legitimate reformulations of the current instruction, so long as the instruction maintains the two-element approach to the burden of proof . . .

- In examining instruction 200, the committee should make every effort to remedy one of the most troubling aspects of the instruction: the juxtaposition of the two elements of the burden of proof . . .

General Verdict. If a general verdict is used, the first paragraph should read:

> The verdict form requires you to state whether you find for the plaintiff or the defendant. The burden, called the burden of proof, is on the plaintiff to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that you should find for the plaintiff. If you are not so satisfied, you must find for the defendant.

Guessing and Speculation. This instruction was revised in 1989 to incorporate concepts relating to speculation and guessing that were previously contained in Wis JI-Civil 220. As a result of this revision, the Committee believes a separate general instruction on speculation is not necessary and, therefore, Wis JI-Civil 220 was withdrawn.

Case Law. Wisconsin law recognizes and requires differing degrees of persuasion for different types of cases. Thus, separate and distinct burdens exist for: (1) criminal cases (beyond a reasonable doubt); (2) civil cases with penal aspects or involving criminal type behavior (higher civil standard: to a reasonable certainty by evidence that is clear, satisfactory, and convincing); and (3) ordinary civil actions (ordinary civil standard to a reasonable certainty by the greater weight of the credible evidence).

Each of these three burdens of proof has a mental element. This mental component is identical for the two civil standards (i.e., "satisfaction to a reasonable certainty"). Criminal cases call for a higher mental element: "beyond a reasonable doubt." In addition to the mental component, the two civil standards include a requirement as to the kind of evidence needed to carry a burden, i.e., "clear, satisfactory, and convincing evidence" for the middle civil burden and "greater weight of the credible evidence" for the ordinary civil burden.

Chief Justice Hallows in 1972 discussed the two components of the civil burdens in writing for the court in State ex rel. Brajdic v. Seber, 53 Wis.2d 446, 448, 193 N.W.2d 43 (1972):

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> Every standard of burden of proof, other than the standard applied to criminal cases, is composed of two elements: (1) The degree of certitude required of the trier of the fact, i.e., reasonable certainty, and (2) either the quantity of the evidence, i.e., the greater weight or convincing power, or the quality of the evidence, i.e., clear, satisfactory, and convincing.

Along these same lines, the court, in Kuehn v. Kuehn, 11 Wis.2d 15, 104 N.W.2d 138 (1960), said the "complete rule of the burden of proof contains both the element of reasonable certainty and some degree of preponderance of the evidence."

Some have suggested, pointing to decisions predating 1920, that the dual component civil burdens can be abbreviated by simply dropping the mental element. See Sullivan v. Minneapolis, St. Paul & S.S.M.R. Co., 167 Wis. 518, 167 N.W. 311 (1918). The Committee disagrees with such proposals and follows the rationale expressed by the Wisconsin Supreme Court in Kuehn v. Kuehn, supra, in which Chief Justice Hallows said:

> The statement of the complete rule of the burden of proof contains both the element of reasonable certainty and some degree of preponderance of the evidence. It is possible the contestant having the burden of proof may have the preponderance of the evidence fair, clear, or otherwise in his favor and still fall short of convincing the jury to a reasonable certainty of the existence of the facts for which he is contending. 11 Wis.2d at 28

Based on the Committee's review of the case law, the Committee concluded in 1989 that this instruction, as well as the instruction on the middle burden (JI-Civil 205), correctly instruct juries on the burdens of proof in civil actions.

Suggestions have also been made to the Committee and to trial judges during instruction conferences that the certainty element ("to a reasonable certainty") should be replaced with the term "reasonable probability." Apparently, this suggestion is prompted by the fact that most expert witnesses, at least in medical malpractice cases, are asked to give opinions "to a reasonable probability." In Victorson v. Milwaukee & Suburban Transport. Corp., 70 Wis.2d 336, 356-57 234 N.W.2d 332 (1975), the trial judge used the word "probability" in place of "certainty" in Wis JI-Civil 200. The remainder of the instruction defining "greater weight" and "credible evidence" was given. The court said using the term "reasonable probability" was error, although not reversible error. The court also said the "use of probability rather than certainty was not to be encouraged."

The Committee feels that "greater weight" is an exact synonym for "fair preponderance" and much more understandable by the average juror. This expression of the ordinary burden was cited approvingly by the supreme court in Wangen v. Ford Motor Co., 97 Wis.2d 260, 299, 294 N.W.2d 437 (1980).

Adverse Possession. This instruction should be used in adverse possession cases. Kruse v. Horlamus Indus., 130 Wis.2d 357, 387 N.W.2d 64 (1986). Perpignani v. Vonasek, 139 Wis.2d 695, 735, 408 N.W.2d 1 (1987). In Kruse, the court expressly rejected the argument that the middle burden of proof applies

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to the jury's determination of whether adverse possession has occurred. In some older adverse possession cases, the term "clear and positive" evidence appears regarding evidence of possession. In Kruse, the title holder of the property argued that this term, "clear and positive," means that the middle burden of proof applies to the jury's determination. The court disagreed, concluding that the term is not to be used for the overall burden of proof. Instead, this term refers only to the quality of evidence which may even be considered. To avoid confusion in future cases, the court expressly instructed trial judges to delete this term from their instructions to juries on adverse possession.

Comparative Negligence. For the burden of proof in connection with the comparison of negligence question, see Wis JI-Civil 1580, Comparative Negligence: Basis of Comparison.

Presumptions. Special attention is needed when instructing the jury on the burden of proof in cases involving statutory or common law presumptions. See Wis JI-Civil 1600, for an example of a situation where the burden rests upon the party contending the answer to a special verdict question should be "no."

Damages. See Wis JI-Civil 202 and 1700 for the burden of proof on damages.

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202 BURDEN OF PROOF: ORDINARY: COMPENSATORY DAMAGES

In considering the amount to be inserted by you in answer to each damage question, the burden rests upon each person claiming damages to convince you by the greater weight of the credible evidence, to a reasonable certainty, that the person sustained damages (with respect to the element or elements mentioned in the question) and the amount of the damages.

The amount you insert should reasonably compensate the person named in the question for the damages from the (accident) (occurrence.)

COMMENT

The instruction was approved in 2000. An editorial correction was made in 2004.

Ellsworth v. Schelbrock, 2000 WI 63, ¶17, 235 Wis.2d 678, 689, 611 N.W.2d 764. See also Sufferling v. Heyl & Patterson, 139 Wis. 510, 517-18, 121 N.W. 251 (1909). See also Smee v. Checker Cab Co., 1 Wis.2d 202, 83 N.W.2d 492 (1957), and Maslow Cooperage Corp. v. Weeks Pickle Co., 270 Wis. 179, 191, 70 N.W.2d 577, 583 (1955).

See also Wis JI-Civil 1700, Damages: General.

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205 BURDEN OF PROOF: MIDDLE

The burden of proof on question(s) _____ rests upon the party contending that the answer to the question should be "yes." The burden is to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that "yes" should be the answer to (that) (those) question(s).

Clear, satisfactory, and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power.

"Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof.

[This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence, but may be less than beyond a reasonable doubt.]

COMMENT

This instruction was approved by the Committee in 1974 and revised in 1989, 1997, 2004, and 2010. A comma was added to the last sentence in 2011. The comment was updated in 1981, 1986, 1988, 1989, 1995, 2001, 2004, 2010, 2011, and 2016.

The Committee revised this instruction in 1997 because it concluded that the prior version of the instruction did not adequately explain to a jury what the middle burden of proof is. Under this former version, the jury was instructed as follows:

> The burden of proof as to each question in the verdict is on the plaintiff to convince you to a reasonable certainty by evidence that is clear, satisfactory, and convincing that the question should be answered "yes."
>
> If you have to guess what the answer should be after discussing all evidence which relates to a particular question, then the party having the burden of proof as to that question has not met the required burden. Wis JI-Civil 205 (1989).

Some have suggested that explaining the differences between the two civil burdens is merely an academic/legalistic exercise because juries cannot realistically tell the difference between the "ordinary" and

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"middle" burden of proof. See Judge Cane's concurrence, joined by Judge Fine, in Carlson & Erickson v. Lampert Yards, 183 Wis.2d 220, 515 N.W.2d 305 (Ct. App. 1993). Others have argued that the "greater weight of the evidence" component of the ordinary burden actually sounds like a more rigorous or higher standard than "clear, satisfactory, and convincing" in our currently established middle burden. Although the Committee is aware of this criticism, it believes that (1) the supreme court has consistently required two civil burdens, and (2) the current version of this instruction conforms to the expressions of the court that the middle burden be expressed in terms of clear, satisfactory, and convincing evidence.

Weight; Degree of Certitude. Wisconsin case law provides little instruction on the middle burden. As to quantity, the middle burden is said to mean the clear preponderance which has been translated to mean "clear weight of the evidence" or "clearly more probable than not." Klipstein v. Raschein, 117 Wis. 248, 94 N.W. 63 (1903). As to quality, the supreme court has said that clear, satisfactory, and convincing evidence refers to the quality or convincing power of the evidence necessary to produce the greater certainty a degree of reasonable certitude required. Kuehn v. Kuehn, 11 Wis.2d 15, 104 N.W.2d 138 (1960).

The middle burden of proof requires a greater degree of certitude than that required in ordinary civil cases, but a lesser degree than that required to convict in a criminal case. Kruse v. Horlamus Indus., 130 Wis.2d 357, 363, 387 N.W.2d 64 (1986).

Types of Cases. The middle burden of proof is required in certain civil actions which involve such matters as fraud, undue influence, punitive damages, and acts which would be considered criminal. Kruse v. Horlamus Indus., supra; Layton School of Art & Design v. WERC, 82 Wis.2d 324, 362-63, 262 N.W.2d 218 (1978); Wangen v. Ford Motor Co., 97 Wis.2d 260, 294 N.W.2d 437 (1980); Kuehn v. Kuehn, 11 Wis.2d 15, 26, 104 N.W.2d 138 (1960); Macherey v. Home Ins. Co., 184 Wis.2d 1, 516 N.W.2d 434 (Ct. App. 1994). Both the decisions in Kuehn and Wangen list the types of cases in which the middle burden is required. In addition, the middle burden applies in an action for reformation of a contract. Bailey v. Hovde, 61 Wis.2d 504, 213 N.W.2d 609 (1973). In adverse possession cases, the lower burden of proof (Wis JI-Civil 200) should be submitted, not the middle burden of proof. Kruse v. Horlamus Indus., supra at 367; Perpignani v. Vonasek, 139 Wis.2d 695, 735, 408 N.W.2d 1 (1987).

The question of whether the middle burden of proof applies to a given claim, defense, or limitation on liability was generally left to Wisconsin case law and the common law. That has changed significantly over the last 25 years as the Wisconsin Legislature has entered this area. The Wisconsin Legislature has now dictated that the clear and convincing evidence standard applies to many disparate areas of Wisconsin law. There are now over 100 Wisconsin statutes which contain the phrase "clear and convincing evidence." Numerous Wisconsin statutes now use these, or similar, phrases: "willfully, wantonly, or recklessly"; "reckless, wanton or intentional misconduct"; and "gross negligence." It is the Committee's opinion that, when Wisconsin statutes use those phrases and similar phrases, the middle burden of proof is required.

Variations of Middle Burden at Common Law. The Committee recognizes that variations of this middle burden are found throughout earlier Wisconsin case law. For example, in release cases, the court in 1949 held that to impeach a written release on the ground of fraud or mistake, the proof must be "clear and convincing beyond reasonable controversy." Jandrt v. Milwaukee Auto Ins. Co., 255 Wis. 618, 39 N.W.2d 698 (1949). Similarly, the court said in 1981that use of excessive force in a battery action must be proved by a "clear and satisfactory preponderance of the evidence." Johnson v. Ray, 99 Wis.2d 777, 299 N.W.2d 849 (1981). Further variations of this middle burden are presented in Kuehn, supra. Despite these variations, the supreme court has expressly stated that the "preferential way" of stating the middle standard of proof is in terms of "clear, satisfactory, and convincing." Madison v. Geier, 27 Wis.2d 687, 135 N.W.2d 761 (1965). See also Wangen, supra at 299. In the interests of achieving uniformity in the expression of the middle standard, the Committee strongly recommends that whenever the trial court determines that the middle burden is required, the above instruction should be used even though a variation of the standard may exist in case law.

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210 BURDEN OF PROOF WHERE VERDICT CONTAINS A MIDDLE STANDARD QUESTION

Instruction Withdrawn.

COMMENT

This instruction was withdrawn in 1997 because JI-Civil 205 was revised. The new version of JI-Civil 205 explains to jurors that the middle burden applies to certain questions and eliminates the need for JI-Civil 210.

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215 CREDIBILITY OF WITNESSES; WEIGHT OF EVIDENCE

It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.

In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors:

- whether the witness has an interest or lack of interest in the result of this trial;
- the witness' conduct, appearance, and demeanor on the witness stand;
- the clearness or lack of clearness of the witness' recollections;
- the opportunity the witness had for observing and for knowing the matters the witness testified about;
- the reasonableness of the witness' testimony;
- the apparent intelligence of the witness;
- bias or prejudice, if any has been shown;
- possible motives for falsifying testimony; and
- all other facts and circumstances during the trial which tend either to support or to discredit the testimony.

Then give to the testimony of each witness the weight you believe it should receive.

There is no magic way for you to evaluate the testimony; instead, you should use your common sense and experience. In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same thing here.

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The weight of evidence does not depend on the number of witnesses on each side. You may find that the testimony of one witness is entitled to greater weight than that of another witness or even of several other witnesses.

COMMENT

This instruction was approved by the Committee in 1972 and revised in 1984 and 2010. The comment was revised in 1984, 1991, and 2010.

Jury's Duty: Collier v. State, 30 Wis.2d 101, 140 N.W.2d 252 (1966). See also Shawver v. Roberts Corp., 90 Wis.2d 672, 280 N.W.2d 226 (1979); American Family Mut. Ins. Co. v. Dobrzynski, 88 Wis.2d 617, 277 N.W.2d 749 (1979).

Weight of Evidence: O'Brien v. Chicago & N.W. Ry., 92 Wis. 340, 343, 66 N.W. 363, 364 (1896).

Juror's Knowledge: Solberg v. Robbins Lumber Co., 147 Wis. 259, 266-70, 133 N.W. 28, 30-32 (1911), laid down the rule held that a juror may use individual knowledge, observation, and experience. See also Coenen v. Van Handel, 269 Wis. 6, 10, 68 N.W.2d 435, 437 (1955); McCarty v. Weber, 265 Wis. 70, 72, 60 N.W.2d 716, 718 (1953); and De Keuster v. Green Bay & W. R.R., 264 Wis. 476, 479, 59 N.W.2d 452, 454 (1953).

Although a jury may, if it so desires, place less credence in the testimony of a witness whose evidence is inconsistent, the inconsistency does not render that testimony incredible as a matter of law. It is the function of the jury to determine where in the discrepant testimony and contradiction of the witness the truth really is. Millonig v. Bakken, 112 Wis.2d 445, 453-54, 334 N.W.2d 80 (1983).

For the credibility of a child witness, see Wis JI-Criminal 340.

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220 JURY NOT TO SPECULATE

This instruction was withdrawn by the Committee in 1990. See Comment to Wis JI-Civil 200.

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230 CIRCUMSTANTIAL EVIDENCE

It is not necessary that every fact be proved directly by a witness or an exhibit. A fact may be proved indirectly by circumstantial evidence. Circumstantial evidence is evidence from which a jury may logically find other facts according to common knowledge and experience.

Circumstantial evidence is not necessarily better or worse than direct evidence. Either type of evidence can prove a fact.

COMMENT

This instruction was initially approved in 1972 and revised in 1991 and 2010. This instruction is based on Wis JI-Criminal 170.

See Krause v. Milwaukee Mut. Ins. Co., 44 Wis.2d 590, 172 N.W.2d 181 (1969); Pfeifer v. Standard Gateway Theater, Inc., 259 Wis. 333, 48 N.W.2d 505 (1950); Truelsch v. Miller, 186 Wis. 239, 202 N.W. 352 (1925); Guillaume v. Wisconsin-Minnesota Light & Power Co., 161 Wis. 636, 155 N.W. 143 (1915); 29 Am. Jur.2d Evidence §§ 264-65 (1967); Reicher v. Rex Accessories Co., 228 Wis. 425, 436, 279 N.W. 645 (1938); Cooper v. Chicago & N.W. Ry., 155 Wis. 614, 619, 145 N.W. 203 (1914); 30 Am. Jur.2d Evidence § 1091 (1967); Rumary v. Livestock Mortgage Credit Corp., 234 Wis. 145, 147, 290 N.W. 611 (1940); Hyer v. Janesville, 101 Wis. 371, 77 N.W. 729 (1898).

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255 DRIVER'S MANUAL: USE BY JURY

Instruction withdrawn.

COMMENT

This instruction was withdrawn in 2010.

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260 EXPERT TESTIMONY

Usually, witnesses can testify only to facts they know.

But, a witness with expertise in a calling (specialty) may give an opinion in that calling (specialty). In determining the weight to be given an opinion, you should consider the qualifications and credibility of the expert and whether reasons for the opinion are based on facts in the case. Opinion evidence was admitted in this case to help you reach a conclusion. You are not bound by any expert's opinion.

(In resolving conflicts in expert testimony, weigh the different expert opinions against each other and consider the qualifications and credibility of the experts and the reasons and facts supporting their opinions.)

COMMENT

This instruction was approved by the Committee in 1972 and revised in 1986, 1991, and 2011. The comment was updated in 1982, 1986, 1988, 1991, 2011, 2012, and 2017.

Wis. Stat. §§ 907.02 and 907.03; Black v. General Elec. Co., 89 Wis.2d 195, 212-13, 278 N.W.2d 224 (1979); Milbauer v. Transport Employes' Mut. Benefit Soc'y, 56 Wis.2d 860, 203 N.W.2d 135 (1973); Rabata v. Dohner, 45 Wis.2d 111, 172 N.W.2d 409 (1969); Andersen v. Andersen, 8 Wis.2d 278, 283, 99 N.W.2d 190, 193 (1959); Anderson v. Eggert, 234 Wis. 348, 361, 291 N.W. 365, 371 (1940).

In Wisconsin, the general rule is that a nonexpert owner of property may testify concerning the property's value. Perpignani v. Vonasek, 139 Wis.2d 695, 408 N.W.2d 1 (1987).

For Expert Testimony: Hypothetical, see Wis JI-Civil 265.

For expert testimony in a medical malpractice trial, see Wis JI-Civil 1023; Weborg v. Jenny, 2012 WI 67 (Paragraph 73), 341 Wis.2d 668, 816 N.W.2d 191 and Seifert v. Balink, 2017 WI 2, 372 Wis.2d 525, 888 N.W.2d 816.

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261 MEDICAL OR SCIENTIFIC TREATISE IN EVIDENCE

During the trial, the court received portions of a published treatise in evidence written by _____. This evidence was not received to establish that the views expressed by the author are undisputed truths or absolute standards. The author's views should be considered as any other expert witness' opinion.

You are not bound by the opinions expressed by the author any more than you are bound by the opinion of any other expert witness.

COMMENT

This instruction was approved by the Committee in 1972 and revised in 1986. The comment was updated in 1982 and 1986 and reviewed without change in 1989.

Wis. Stat. § 908.03(18); Lewandowski v. Preferred Risk Mut. Ins. Co., 33 Wis.2d 69, 146 N.W.2d 505 (1966).

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265 EXPERT TESTIMONY: HYPOTHETICAL QUESTIONS

During the trial, an expert witness was told to assume certain facts and asked for an opinion based upon the assumed facts. This is called a hypothetical question. Consider the opinion in answer to the question only if you believe the assumed facts upon which it is based. If you find that the assumed facts in the hypothetical question have not been proved, do not give any weight to the opinion.

COMMENT

This instruction was approved by the Committee in 1972 and revised in 1986, 1991, and 2010. The comment was updated in 1982 and 1986. The comment was reviewed without change in 1989.

Wis. Stat. § 907.03; a hypothetical question during the trial may be based on facts not yet in evidence. Novitzke v. State, 92 Wis.2d 450, 285 N.W.2d 868 (1979). See also Schulz v. St. Mary's Hosp., 81 Wis.2d 638, 652, 260 N.W.2d 783 (1978), and Rabata v. Dohner, 45 Wis.2d 111, 126, 172 N.W.2d 409 (1969).

Milbauer v. Transport Employes' Mut. Benefit Soc'y, 56 Wis.2d 860, 866, 203 N.W.2d 135 (1973).

McGaw v. Wassman, 263 Wis. 486, 492, 57 N.W.2d 920, 922 (1953).

For Expert Testimony: General, see Wis JI-Civil 260.

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268 OPINION OF A NONEXPERT WITNESS

Ordinarily, a witness may testify only about facts. However, in this case (name of witness) was allowed to give an opinion as to (identify the subject on which an opinion was given).

In determining the weight you give to this opinion, you should consider the witness' opportunity to observe what happened and the extent to which the opinion is based on that observation.

Opinion evidence was received to help you reach a conclusion. However, you are not bound by the opinion of any witness.

COMMENT

This instruction and comment were approved in 2012.

This instruction is for the situation where a nonexpert witness is allowed to testify in the form of an opinion. § 907.01.

Section 907.01 was amended by 2011 Wisconsin Act 2 to read as follows:

> 907.01 Opinion testimony by lay witnesses. If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are all of the following:
>
> (1) Rationally based on the perception of the witness.
>
> (2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.
>
> (3) Not based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02(1).

Subsections (1) and (2) were part of the prior statute; subsection (3) was created by Act 2.

For discussion on the opinion of a nonexpert witness, see Wis JI-Criminal 201.

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305 MEASUREMENTS

There is testimony with reference to both observations and measurements of distances. Testimony based on casual observation or estimate must yield to that based on measurements by disinterested, unimpeached witnesses.

COMMENT

This instruction was approved by the Committee in 1960 and revised in 1986. The comment was updated in 1982 and 1986. The comment was reviewed without change in 1989.

Consolidated Papers, Inc. v. ILHR Dep't, 76 Wis.2d 210, 221, 251 N.W.2d 69 (1977); Capital Sand & Gravel Co. v. Waffen Schmidt, 71 Wis.2d 227, 234, 237 N.W.2d 745 (1976); Scalzo v. Marsh, 13 Wis.2d 126, 150, 108 N.W.2d 163 (1961).

The phrase "disinterested and unimpeached" is proper. Jacobson v. Milwaukee, 262 Wis. 256, 260, 55 N.W.2d 1, 3 (1952), citing Wanta v. Milwaukee Elec. Ry. & Light Co., 148 Wis. 295, 298, 134 N.W. 133, 135 (1912); Serkowski v. Wolf, 251 Wis. 595, 601, 30 N.W.2d 223, 226 (1947).

In Milwaukee Trust Co. v. Milwaukee, 151 Wis. 224, 230, 138 N.W. 707, 710 (1912), the word "witnesses" was not qualified.

In Capital Sand & Gravel Co., supra, the court recognized that "in the area of measurement testimony, not only must testimony based on memory or casual observation yield to that which is based on actual measurement but, in addition, it is not to be rejected in the absence of opposing proof." (Citing Serkowski, supra.)

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315 NEGATIVE TESTIMONY

Positive testimony of credible witnesses regarding an event is entitled to greater weight than negative testimony of equally credible witnesses as to the same event.

Testimony of a witness that the witness (heard the bell) is positive testimony.

Testimony of a witness (that the witness did not hear the bell) under circumstances that the witness (could have heard the bell) if it had actually (rung) may be positive or negative testimony.

If the witness' sense (of hearing) was directed toward learning whether (the bell did ring), the witness' testimony that the witness (did not hear the bell) is positive testimony.

If the witness' sense (of hearing) was not directed toward learning whether (the bell did ring), the witness' testimony that the witness (did not hear the bell) is negative testimony.

The strength or weakness of negative testimony depends upon all the circumstances and the weight you give to this testimony is for you to decide.

COMMENT

This instruction was approved by the Committee in 1972 and revised in 1986 and 1991. The comment was updated in 1982, 1986, and 2016.

The general rule is that the weight to be accorded negative evidence is a matter for the jury to determine. Conrardy v. Sheboygan County, 273 Wis. 78, 82, 76 N.W.2d 560, (1956); Resseguie v. American Mut. Liab. Ins. Co., 51 Wis.2d 92, 186 N.W.2d 236, 244 (1971). This instruction provides for an exception to the general rule when certain criteria are met. Care should be used before giving the instruction. Not all testimony that might appear negative constitutes "negative testimony" warranting the instruction e.g. testimony of absence of entry in records is not negative testimony, Resseguie, supra; testimony that a party did not speak the words charged found not to be negative testimony, Suick v. Krom, 171 Wis. 254, 177 N.W. 20, 21 (1920). The court in Suick ruled that "Negative testimony relates only to the testimony of a witness who had an opportunity to see an occurrence, testified by some other witnesses to have taken place, that he did not see it, or of one who had an opportunity to hear or know of an occurrence testified positively by some other witnesses to have happened, that he did not hear or recollect it. Id. In addition to the requirement of negative testimony, the rule requires the element of equal credibility of the witnesses. Id. at 20-21.

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Sometimes, testimony which appears positive can be sufficiently negative in effect to warrant the instruction. In explaining why an instruction similar to Wis JI-Civil 315 was warranted, the court ruled: "Although Mustas testified he did not go into the construction office or speak with anyone there, he also stated that he could not recall whether he went there or spoke with anyone. Under these circumstances, his testimony although positive in form is negative in effect." Mustas v. Inland Construction, Inc., 19 Wis.2d 194, 120 N.W.2d 95, 99 (1963).

Conrardy v. Sheboygan County, 273 Wis. 78, 82, 76 N.W.2d 560, 562 (1956); Rambow v. Wilkins, 264 Wis. 76, 78, 58 N.W.2d 517, 518 (1953); Zenner v. Chicago, St. P., M. & O. Ry., 219 Wis. 124, 126-29, 262 N.W. 581, 582-84 (1935).

Resseguie v. American Mut. Liab. Ins. Co., 51 Wis.2d 92, 186 N.W.2d 236 (1971); Becker v. Barnes, 50 Wis.2d 343, 184 N.W.2d 97 (1971).

A jury may not disregard positive, uncontradicted testimony as to the existence of some fact, or the happening of some event, in the absence of something in the case which discredits the existence of the fact or renders it against responsible probabilities. Schulz v. St. Mary's Hosp., 81 Wis.2d 638, 650, 260 N.W.2d 783 (1978).

This instruction needs to be tailored to the particular facts and witnesses in the case.

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325 PHYSICAL FACTS

If you find a witness' testimony conflicts with physical facts established by evidence and that the testimony cannot be reconciled with the physical facts, then disregard the conflicting testimony. But, the testimony of a witness is overcome by physical facts only if such facts establish a conclusion contradicting such testimony beyond any reasonable ground for doubt.

COMMENT

This instruction was approved by the Committee in 1960. The instruction and comment were updated in 1986. The comment was reviewed without change in 1989.

Pappas v. Jack O. A. Nelson Agency, Inc., 81 Wis.2d 863, 369, 260 N.W.2d 721 (1978); Chart v. General Motors Corp., 80 Wis.2d 91, 111-12, 258 N.W.2d 680 (1977); Corning v. Dec Aviation Corp., 50 Wis.2d 441, 184 N.W.2d 152 (1971); New Amsterdam Casualty Co. v. Farmers Mut. Auto Ins. Co., 5 Wis.2d 646, 649, 94 N.W.2d 175, 177 (1959); Kleckner v. Great Am. Indem. Co., 257 Wis. 574, 577, 44 N.W.2d 560, 562 (1950); Schoenberg v. Berger, 257 Wis. 100, 106, 42 N.W.2d 466, 469 (1950); Strnad v. Coop. Ins. Mut., 256 Wis. 261, 271, 40 N.W.2d 552, 559 (1949); McCarthy v. Thompson, 256 Wis. 113, 116, 40 N.W.2d 560, 562 (1949).

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LAW NOTE FOR TRIAL JUDGES

349 PRESUMPTIONS AND PERMISSIVE INFERENCES

The 1974 Rules of Evidence made substantial changes in the theory of presumptions:

1) All presumptions are now treated the same, whether previously characterized as common law, statutory, policy, of fact, or of law;

2) Presumptions do not "disappear," "burst," or drop out when evidence to the contrary of the presumed fact is introduced;

3) A presumption when established shifts the burden of persuasion (proof) as well as the burden of proceeding to the party against whom the presumption is directed.

The instructions (Wis JI-Civil 350-356) which follow illustrate the common situations which arise. Not all instructions on presumptions are collected here; others will be found located with topics to which they are related.

To understand the words used in the models which follow, it is necessary to keep in mind the meaning of "basic fact" and "presumed fact." A presumption is a device to simplify proof; it does so by letting a fact easy to establish — the basic fact — stand for the fact difficult to establish — the presumed fact. So ownership of a car may stand for (or prove) the proposition that the driver of the car was the agent of the owner.

The instructions which follow illustrate the common proof situations in which a presumption may be involved: 1) conflict as to existence of the basic fact and also evidence from which nonexistence of the presumed fact may be inferred; 2) no conflict as to the basic fact, but evidence from which nonexistence of the presumed fact may be inferred; 3) conflict as to the existence of the basic fact but no evidence from which the nonexistence of the presumed fact may be inferred. The situation in which there is no conflict as to either the

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basic fact or the presumed fact is covered in the second paragraph of the comment to Wis JI-Civil 354.

The process of drawing inferences is logical. It is fundamental to litigation. From the standpoint of the judge, it is legal-scientific-common-sense. The judge says: I will let the jury find that the act of the defendant railroad company caused the fire because (for example) trains do emit sparks and the fire in the field was noticed shortly after the passage of the train, and no other cause of the fire was produced. This inference is legally permissible because it is logical and does not offend science or common sense. This is the "reasonable inference."

A presumption is an inference required by law. It may be logical or illogical. The illogical presumptions as, for example, the presumption that a deceased person was not negligent are not logically related to the basic fact (death) and are established, for policy reasons, to facilitate the bringing of a case, by shifting the burden of proof to the opponent who may be better able to produce evidence on the matter (the negligence of the deceased).

Between the reasonable inference and the presumption is the permissive inference; res ipsa is an example; see Wis JI-Civil 356. This is also an inference required by law; it differs from a presumption in that its impact on the jury, through the instruction given, is less. In the presumption instruction, the jury is told "you must give effect to the presumption unless you find the contrary of the presumed fact more probable"; in the permissive instruction, the instruction is "you may find."

COMMENT

This note was originally published in 1977. An editorial correction was made in 2015 to remove the term, "guilty of negligence." The comment was updated in 2017.

See Wisconsin Judicial Council Notes at 59 Wis.2d R41-R56. See also Blinka, Daniel, Wisconsin Evidence, 3rd (Volume 7, Wisconsin Practice Series), Chapter 903 Presumptions § 301.2 - 301.4.

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350 PRESUMPTIONS: CONFLICT AS TO EXISTENCE OF BASIC FACT; EVIDENCE INTRODUCED FROM WHICH NONEXISTENCE OF PRESUMED FACT MAY BE INFERRED

There is a conflict in the evidence as to (here state basic fact). There is evidence from which you may conclude that (state the basic fact) exists; on the other hand, there is evidence from which you may conclude that (state the basic fact) does not exist. You must resolve this conflict.

If you find the existence of (state the basic fact) more probable than not, then, by law, a presumption arises that (state the presumed fact). But there is also evidence from which you can conclude that (state the presumed fact) does not exist. You must resolve this conflict. Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable that (state the presumed fact) does not exist, you must find that (state the presumed fact) exists.

COMMENT

This instruction was approved by the Committee in 1977. The comment was updated in 1984 and revised in 1991, 2010, and 2012. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

For the treatment of presumptions in civil cases, see Wis. Stat. § 903.01. See also Wisconsin Rules of Evidence, 59 Wis.2d R50-51; Westfall v. Kottke, 110 Wis.2d 86, 113, 328 N.W.2d 481 (1983).

For the use of this instruction in a trial involving a claim of self-defense under Wis. Stat. § 895.62, see Wis JI-Civil 2006.2.

Retrograde amnesia may be used as an illustration of the use of this instruction in the situation where it is claimed that the amnesia was caused by the accident involved in the litigation. This is an example of an illogical, or contrary to fact, presumption.

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Example of Use of Wis JI-Civil 350

The law provides that if a person has retrograde amnesia as a result of an accident, there is a presumption that the person was not negligent at the time of the accident. There is a conflict in the evidence as to whether or not __(name)__ has retrograde amnesia. There is evidence from which you may conclude that __(name)__ has retrograde amnesia; on the other hand, there is evidence from which you may conclude that __(name)__ does not have retrograde amnesia. You must resolve this conflict. If you find it more probable than not that __(name)__ has retrograde amnesia, then, by law, a presumption arises that __(name)__ was not negligent. But there is also evidence from which you can find that __(name)__ was not negligent. You must resolve this conflict. Unless you are satisfied, by the greater weight of the credible evidence to a reasonable certainty, that __(name)__ was negligent, you must find that, at the time of the accident, __(name)__ was not negligent.

Retrograde Amnesia. To prove the basic fact of retrograde amnesia, expert medical testimony is necessary. Ernst v. Greenwald, 35 Wis.2d 763, 151 N.W.2d 706 (1967); Schemenauer v. Travelers Indem. Co., 34 Wis.2d 299, 149 N.W.2d 644 (1967); Mallare, Wisconsin Civil Trial Evidence, 1969 Supp., at 284.

While the point has not been decided, it may be possible to give the instruction where retrograde amnesia has been proved even though it was not caused by the accident.

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352 PRESUMPTIONS: EXISTENCE OF BASIC FACT UNCONTRADICTED; EVIDENCE INTRODUCED FROM WHICH NONEXISTENCE OF PRESUMED FACT MAY BE INFERRED

There is no dispute that (state the basic fact). From these facts, a presumption arises that (state the presumed fact). But there is evidence in the case which may be believed by you that (state the negative of the presumed fact). You must resolve the conflict. Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable (state the negative of presumed fact), you must find that (state the presumed fact).

COMMENT

This instruction was approved by the Committee in 1977. The comment was updated in 1989, 2010, and 2012. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

This instruction is designed for the case where there is no conflict in the basic facts, but there is evidence from which the contrary of the presumed fact may be inferred.

For the use of this instruction in a trial involving a claim of self-defense under Wis. Stat. § 895.62, see Wis JI-Civil 2006.2.

This form is proper, for example, to state the presumption that a letter, properly addressed, stamped, and mailed with sender's return address thereon, is received by the addressee in the case where there is also evidence that the letter was not received. For other examples, see Wis JI-Civil 1600, Agency: Driver of Automobile; Wis JI-Civil 1026.5, Bailment: Negligence of Carrier Presumed.

For the presumption of due care by a deceased person, see Wis JI-Civil 353.

For the presumptions to be given to billing statements and invoices for health care services in Wis. Stat. § 908.03(6m)(bm), see Wis JI-Civil 1756 and 1757.

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353 PRESUMPTIONS: DECEASED PERSON WAS NOT NEGLIGENT

Because (decedent) has died and cannot testify, you must presume that (decedent) was not negligent at and before the time of the occurrence, unless you find the presumption is overcome by other evidence.

In deciding whether (decedent) was negligent, you must weigh the presumption with all the other evidence. Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more likely that (decedent) was negligent, you must find that (decedent) was not negligent.

COMMENT

The instruction and comment were approved in 1989. The instruction was revised in 1991. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

See Seligman v. Hammond, 205 Wis. 199, 236 N.W. 115 (1931); Theisen v. Milwaukee Automobile Mut. Ins. Co., 18 Wis.2d 91, 118 N.W.2d 140 (1962). Theisen applied the "bursting bubble" theory to the presumption, i.e., the presumption of due care is eliminated and drops out of the case entirely once the defense presents evidence showing conduct contrary to the presumption. As explained in Law Note, Wis JI-Civil 349, the 1974 rules of evidence made substantial changes in the theory of presumptions. Presumptions do not disappear or burst when evidence contrary to the presumed fact is presented. Instead, a presumption when established shifts the burdens of persuasion and proceeding. See Law Note, Wis JI-Civil 349, p. 2, for the policy reasons for the presumption of due care.

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354 PRESUMPTIONS: CONFLICT AS TO EXISTENCE OF BASIC FACT; NO EVIDENCE INTRODUCED FROM WHICH NONEXISTENCE OF PRESUMED FACT COULD BE INFERRED

The law provides (state the presumption).

There is a conflict in the evidence as to whether or not (state the basic fact). There is evidence from which you may conclude that (state the basic fact); on the other hand, there is evidence from which you may conclude (state the contrary of the basic fact). You must resolve this conflict.

If you find that (state the basic fact), you must find that (state the presumed fact).

COMMENT

This instruction was approved by the Committee in 1977. The comment was revised in 1991.

This instruction is designed for the case in which there is conflict as to the existence of the basic fact, and no evidence to the contrary of the presumed fact; in this situation, the jury must determine whether the basic fact exists.

If the evidence of the basic fact is uncontradicted and there is no evidence to the contrary of the presumed fact, the judge will find the presumed fact or instruct the jury to find the presumed fact.

There is no need for this instruction in the situation where the presumed fact is not in issue. For example, in a negligence action, where plaintiff represents a deceased driver, if the defendant has put in no evidence of deceased driver's contributory negligence, there is no need for the plaintiff to prove that the deceased driver was not negligent, and hence no need for the presumption which leads to deceased driver's nonnegligence. (If death, then deceased not negligent.) Conversely, if the plaintiff must prove an element of the case, such as receipt of a letter by the defendant, the instruction on the presumption is necessary, even if the defendant has put in no proof of nonreceipt of the letter, because the plaintiff must establish some way, for the record, the fact of receipt of the letter.

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356 PERMISSIVE INFERENCES; e.g., RES IPSA LOQUITUR

NOTE: Wis. Stat. § 903.01 does not apply to permissive inferences. Wisconsin Rules of Evidence, 59 Wis.2d R45.

Res Ipsa is the only common permissive inference in Wisconsin; Wis JI-Civil 1145 may be used as a model for any other permissive inference.

COMMENT

This note was approved by the Committee in 1977 and was reviewed without change in 1982 and 1989.

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400 SPOLIATION: INFERENCE

[Describe the conduct the court has found to constitute spoliation of evidence.]

You may, but are not required to, infer that (plaintiff) (defendant) (describe spoliation) because producing that evidence would have been unfavorable to (plaintiff)'s (defendant)'s interest.

(For example: The defendant destroyed all of his medical records for patient care provided prior to 2005. You may, but are not required to, infer that the defendant destroyed his medical records from prior to 2005 because producing that evidence would have been unfavorable to defendant's interest.)

COMMENT

This instruction and comment were approved in 2010.

Prior to giving this instruction, the court must first determine if spoliation occurred. If the court finds spoliation has occurred, the court must then determine if the proper sanction for the spoliation of evidence is to instruct the jury on the spoliation inference.

Spoliation Defined. Omnia Praesumuntur Contra Spoliatorem: "All things are presumed against a despoiler or wrongdoer." Black's Law Dictionary 1086 (Sixth Edition 1990).

Spoliation is defined as the destruction or withholding of critically probative evidence resulting in prejudice to the opposing party. Estate of Neumann v. Neumann, 2001 WI App. 61, 242 Wis.2d 205, 245, 626 N.W.2d 821.

The duty to preserve evidence exists whether litigation is pending or not. In evaluating an allegation of document destruction a court should examine whether the party knew or should have known at the time it caused the destruction of the documents that litigation against (the opposing parties) was a distinct possibility. Garfoot v. Fireman's Fund Ins. Co., 228 Wis.2d 707, 718, 599 N.W.2d 411 (Ct. App. 1999), citing Milwaukee Constructors II v. Milwaukee Metro Sewerage District, 177 Wis. 2d 523, 532, 502 N.W.2d 881 Ct. App. 1993; S.C. Johnson & Son, Inc. v. Morris, 2010 WI App. 6, 322 Wis.2d 766, 779 N.W.2d 19.

When a party deliberately destroys documents, the court may find spoliation by applying a two-part analysis. First, the court should consider "whether the party responsible for the destruction of evidence

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knew, or should have known, at the time it destroyed the evidence that litigation was a distinct possibility." Second, the court should consider "whether the offending party destroyed documents which it knew, or should have known, would constitute evidence relevant to the pending or potential litigation." "The purposes of the spoliation doctrine are served only if the offending party has notice that the evidence is or is likely to be relevant to pending or foreseeable litigation and proceeds to destroy the evidence anyway." Ins. Co. of N. Am. v. Cease Electric Inc., 2004 WI App 15, ¶¶ 15 and 16, 269 Wis.2d 286, 294, 674 N.W.2d 886, 890.

There is a five step process for evaluating the destruction of evidence and whether it constitutes spoliation.

(1.) Identification, with as much specificity as possible, of the evidence destroyed;

(2.) The relationship of that evidence to the issues in the action;

(3.) The extent to which such evidence can now be obtained from other sources;

(4.) Whether the party responsible for the evidence destruction knew or should have known at the time it caused the destruction of the evidence that litigation against the opposing parties was a distinct possibility; and

(5.) Whether, in light of the circumstances disclosed by the factual inquiry, sanctions should be imposed upon the party responsible for the evidence destruction and if so, what those sanctions should be.

Milwaukee Constructors II v. Milwaukee Metro Sewerage District, 177 Wis.2d 523, 532, 502 N.W.2d 881 Ct. App. 1993 citing Struthers Patent Corp. v. Nestle Co., 558 F. Supp. 747, 756 (D.N.J. 1981).

Burden of Proof. The party seeking the evidence must prove by clear, satisfactory, and convincing evidence that relevant evidence was intentionally withheld or destroyed. Estate of Neumann v. Neumann, 2001 WI App. 61, ¶¶ 82 and 83, 242 Wis. 2d 205, 246, 626 N.W.2d 821 citing Jagmin v. Simonds Abrasive Co., 61 Wis.2d 60, 80-81, 211 N.W.2d 810 (1973).

Sanctions. The decision whether to impose a sanction for the spoliation of evidence is committed to the trial court's discretion. City of Stoughton v. Thomasson Lumber Co., 2004 WI App. 6, ¶ 38, 269 Wis.2d 339, 675 N.W.2d 487 citing Garfoot v. Fireman's Fund Ins. Co., 228 Wis.2d at 717.

The primary purpose behind the doctrine of spoliation is two fold: (1) to uphold the judicial system's truth-seeking function and (2) to deter parties from destroying evidence. A remedy for spoliation should "advance truth by assuming that the destroyed evidence would have hurt the party responsible for the destruction of evidence and act as deterrent by eliminating the benefits of destroying the evidence." Ins. Co. of N. Am. v. Cease Electric Inc., 2004 WI App. 15, ¶ 16, 269 Wis.2d 286, 295, 674 N.W.2d 886, 891 (Ct. App. 2003).

Courts have fashioned a number of remedies for evidence spoliation. The primary remedies used to combat spoliation are:

(1) Pretrial discovery sanctions;

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(2) The spoliation inference; and

(3) The recognition of independent tort actions for the intentional and negligent spoliation of evidence. Estate of Neumann v. Neumann, 2001 WI App. 61, ¶ 80, 242 Wis.2d 205, 626 N.W.2d 821.

See also Wis. Stat. § 804.12 for sanctions for a failure to make discovery.

Spoliation Inference. Where the spoliation inference is applied, the trier of fact is permitted to draw an inference from the intentional spoliation of evidence that the destroyed evidence would have been unfavorable to the party that destroyed it. Estate of Neumann v. Neumann, 2001 WI App. 61, ¶ 81, 242 Wis.2d 205, 246, 626 N.W.2d 821 citing Beers v. Bayliner Marine Corp., 236 Conn. 769, 675 A.2d 829, 832 (Conn. 1996). The spoliation inference is inappropriate where evidence was negligently destroyed, but may be appropriate where destruction is intentional. In Wisconsin, the operation of the *Maxim Omnia Praesumuntur Contra Spoliatorem* is reserved for deliberate, intentional actions and not mere negligence even though the result may be the same as regards the person who desires the evidence. Jagmin v. Simonds Abrasive Co., 61 Wis.2d 60, 80-81, 211 N.W.2d 810 (1973). See also S.C. Johnson & Son, Inc. v. Morris, 2010 WI App 6, 322 Wis.2d 766, 779 N.W.2d 19.

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405 FALSUS IN UNO

If you are satisfied from the evidence that a witness has willfully testified falsely to a material fact, you may, in your discretion, disregard all the testimony of the witness which is not supported by other credible evidence in the case.

COMMENT

This instruction was approved by the Committee in 1972 and revised in 2010 and 2018.

Use of this instruction is not favored. It should not be given routinely although the Committee believes its discretionary use is appropriate in some circumstances. See, however, the caveat in Ollman v. Wisconsin Health Care Liab. Ins. Plan, 178 Wis.2d 648, 505 N.W.2d 399 (Ct. App. 1993). To warrant giving this instruction, the trial court must be satisfied that there is sufficient evidentiary basis to show there was willful false swearing to a material fact. Pumorlo v. Merrill, 125 Wis. 102, 103 N.W. 64 (1905); 50 Marq. L. Rev. 507 (1967). See also State v. Robinson, 145 Wis.2d 273, 281, 426 N.W.2d 606 (Ct. App. 1988).

Omission of "credible" is error. Blankavag v. Badger Box & Lumber Co., 136 Wis. 380, 386, 117 N.W. 852, 854 (1908).

To warrant giving this instruction, there must be some basis in evidence to show false swearing. Pumorlo, supra at 110-12. In Estate of Neumann v. Neumann, 2001 WI 61, 242 Wis.2d 205, 626 N.W.2d 821, the court noted that the numerous inconsistencies and contradictions in the defendant's deposition and trial testimony provided an evidentiary basis to show there was willful false swearing by the defendant to material facts. The court noted the instruction is not proper where there are mere discrepancies in the testimony that are most likely attributed to defects of memory or mistake. It also agreed with the language in the instruction suggesting that even if the falsus in uno instruction is given, the jury is not required to find the witness willfully testified falsely.

In State v. Williamson, 84 Wis.2d 370, 267 N.W.2d 337 (1978), the refusal to give the falsus in uno instruction in a criminal case was upheld where the witness maintained that her prior testimony was inconsistent because she was confused. The court noted that "[t]he falsus in uno instruction is not favored in the law," citing: Annot., 4 A.L.R.2d 1077 (1949), and emphasized the evidentiary basis required for giving the instruction:

> In order for the falsus in uno instruction to be appropriate, the false testimony must be on a material point and must be willful and intentional. Mere discrepancies in the testimony that are most likely attributed to defects of memory or mistake are not basis for rejecting a witness's testimony entirely. 84 Wis.2d 370, 394.

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410 WITNESS: ABSENCE

If a party fails to call a material witness within (his) (her) control, or whom it would be more natural for that party to call than the opposing party, and the party fails to give a satisfactory explanation for not calling the witness, you may infer that the evidence which the witness would give would be unfavorable to the party who failed to call the witness.

COMMENT

The instruction and comment were originally published in 1967. The instruction was revised in 1985. The comment was updated in 1997, 2012, 2013, 2014, and 2015.

Kochanski v. Speedway SuperAmerica LLC, 2014 WI 72, 356 Wis.2d 1, 850 N.W.2d 160; State ex rel. Park Plaza Shopping Center, Inc. v. O'Malley, 59 Wis.2d 217, 207 N.W.2d 622 (1973); Thoreson v. Milwaukee & Suburban Transp. Co., 56 Wis.2d 231, 237, 201 N.W.2d 745 (1972); Carr v. Amusement, Inc., 47 Wis.2d 368, 177 N.W.2d 388 (1970); Schemenauer v. Travelers Indem. Co., 34 Wis.2d 299, 149 N.W.2d 644 (1966); Ballard v. Lumbermen's Mut. Casualty Co., 33 Wis.2d 601, 148 N.W.2d 65 (1966); Kink v. Combs, 28 Wis.2d 65, 74, 135 N.W.2d 789 (1965); Dodge v. Dobson, 21 Wis.2d 200, 205, 124 N.W.2d 97 (1963); Lubner v. Peerless Ins. Co., 19 Wis.2d 364, 371, 120 N.W.2d 54 (1963); Booth v. Frankenstein, 209 Wis. 362, 245 N.W. 191 (1932); Bowen v. Industrial Comm'n, 239 Wis. 306, 1 N.W.2d 77 (1941). See also Lobermeier v. General Tel. Co. of Wis., 119 Wis.2d 129, 349 N.W.2d 466 (1984); D.L. by Friederichs v. Huebner, 110 Wis.2d 581, 329 N.W.2d 890 (1983); Bode v. Buchman, 68 Wis.2d 276, 228 N.W.2d 718 (1975); Coney v. Milwaukee & Suburban Transp. Corp., 8 Wis.2d 520, 99 N.W.2d 713 (1959).

The Wisconsin Supreme Court has stated that a party to a lawsuit does not have the burden, at his or her peril, of calling every possible witness to a fact, lest the failure to do so will result in an inference against him or her. The requirements of the absent material witness instruction should be narrowly construed to be applicable only to those to a reasonable conclusion that the party is unwilling to allow the jury to have the full truth. Ballard, supra at 615-16. Valiga v. National Food Co., 58 Wis.2d 232, 206 N.W.2d 377 (1973). See also Featherly v. Continental Ins. Co., 73 Wis.2d 273, 282, 243 N.W.2d 806 (1976); Victorson v. Milwaukee & Suburban Transp. Corp., 70 Wis.2d 336, 355, 234 N.W.2d 332 (1975); City of Milwaukee v. Allied Smelt Corp., 117 Wis.2d 377, 344 N.W.2d 523 (Ct. App. 1983).

Trial Court Discretion. There is an area of trial court discretion as to whether the "missing witness" instruction should be given to the jury. Roeske v. Diefenbach, 75 Wis.2d 253, 249 N.W.2d 555 (1977); for example, the age of the witness is a "material consideration" in the trial court's decision not to give the instruction. Dawson v. Jost, 35 Wis.2d 644, 151 N.W.2d 717 (1967). Where the testimony of the witness will be cumulative, the court is proper in refusing to give the instruction. Ballard v. Lumbermen's Mut. Casualty Co., supra.

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In Kochanski, supra, the Wisconsin Supreme Court ruled the trial judge erred by giving this instruction where there was no evidence that the absent witnesses were: material, within the control of the defendant, or that it was more natural for the defendant to call them.

Refusal to give the instruction was not error where plaintiff did not put his dentist on the stand, but the dentist's bill was in record. Lundquist v. Western Casualty & Surety Co., 30 Wis.2d 159, 167, 140 N.W.2d 241 (1966).

Inference. The absent witness instruction does not create a presumption. Instead, it describes a permissible inference. Kochanski, supra. A court may give the instruction only if there are facts in the record that would allow the jury to reasonably draw a negative inference from the absence of a particular material witness. Kochanski, supra; Thoreson, supra. The inference is persuasive rather than probative and, standing alone, would not support plaintiff's case or defendant's defense. Carr v. Amusement, Inc., supra at 376.

Alternative Access to the Testimony. In a bad faith by insurer action, the trial judge gave the jury an absent witness instruction after the insurer failed to call one of its field agents who had investigated the plaintiff's claim. On appeal, the insurer complained that the trial court should not have given the instruction because the investigator's potential testimony was available to the plaintiff because the plaintiff had deposed the investigator during discovery. The insurer argued that the plaintiff could have read to the jury whatever information he wanted from the deposition transcripts. The insurer also contended that an earlier supreme court case, Bode v. Buchman, 68 Wis.2d 276, 228 N.W.2d 718 (1975), established a bright-line rule against giving the absent witness instruction whenever the requesting party had alternative access to the missing witness' testimony. The court of appeals disagreed that a bright-line rule had been previously established. It held that while, the party requesting the instruction in Bode had deposed the missing witness, the requesting party's earlier access to the missing witness' testimony was not the basis for the conclusion that the instruction was not warranted. Instead, it said, in Bode, the court held that the instruction was not appropriate because the party who should have called the absent witness did not have a "special relationship" with the witness. DeChant v. Monarch Life Ins. Co., 204 Wis.2d 137, 554 N.W.2d 225 (Ct. App. 1996).

Availability of a Witness. The test of availability of the witness involves the question of whether it is more natural for one party to call the witness than the other party. Thoreson, supra, p. 238. The Wisconsin Supreme Court has held that it is improper to give the absent-witness instruction when the witness is equally available to both parties. Capello v. Janeczko, 47 Wis.2d 76, 176 N.W.2d 395 (1970); Thoreson, supra.

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415 WITNESS: PRIOR CONVICTION

Evidence was received that a witness has been convicted of a criminal offense. You may consider this evidence in weighing the testimony of that witness and in determining the witness' credibility, but it may not be used for any other purpose.

COMMENT

This instruction was approved by the Committee in 1974 and revised in 1991 and 2010.

Wis. Stat. § 906.09(2) provides that evidence of crime should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Moore v. State, 83 Wis.2d 285, 265 N.W.2d 540 (1978); Whitty v. State, 34 Wis.2d 278, 149 N.W.2d 557 (1967); State v. Hutnik, 39 Wis.2d 754, 159 N.W.2d 733 (1968). See also Fahrenberg v. Tengel, 96 Wis.2d 211, 291 N.W.2d 516 (1980); Voith v. Buser, 83 Wis.2d 540, 266 N.W.2d 304 (1978).

In construing a similar earlier statute, the court said in Underwood v. Strasser, 48 Wis.2d 568, 180 N.W.2d 631 (1970): "This statutory provision applies to civil actions as well as to criminal cases. No distinction between the two categories of cases is made in the statute."

In Fehrman v. Smirl, 25 Wis.2d 645, 131 N.W.2d 314 (1964), also construing the earlier statute, the court instructed jurors that in considering the testimony of S, they were entitled to take into consideration the fact that S had admitted prior conviction of a misdemeanor but that this fact did not disqualify S as a witness; the supreme court held that if the misdemeanor had been one such as a driving offense which did not affect credibility, the instruction would not have been proper.

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420 IMPEACHMENT OF WITNESSES: PRIOR INCONSISTENT OR CONTRADICTORY STATEMENTS

COMMENT

In the past edition, Wis JI-Civil 420 instructed that prior inconsistent statements of a witness could not be considered by the jury as substantive evidence. The Committee withdrew this instruction in 1980 due to changes in statutory and case law as explained below.

Based on Wis. Stat. § 908.01(4)(a)1 and the decision of the Wisconsin Supreme Court in Vogel v. State, 96 Wis.2d 372, 291 N.W.2d 838 (1980), a prior inconsistent statement may be considered by the jury as substantive evidence when:

1. The statement in question is inconsistent with the declarant's testimony at trial, and

2. The declarant is available for cross-examination concerning the statement.

The evidentiary rule governing the use of prior inconsistent statements at trial has undergone a marked change since the court's 1956 decision in State v. Major, 274 Wis. 110, 79 N.W.2d 75 (1956). In Major, the court adhered to the long-standing rule that previous inconsistent statements of a witness could not be accorded any value as substantive evidence. Instead, such statements could only be used at trial for the limited purpose of impeachment.

In 1969, the court modified this general rule by holding that under certain conditions, a witness' prior inconsistent statement could be regarded as substantive evidence. Gelhaar v. State, 41 Wis.2d 230, 163 N.W.2d 609 (1969). Following the Gelhaar decision, the Committee's comment to Wis JI-Civil 420 set forth the following conditions under which prior statements could be considered by the jury as substantive evidence:

(1) When the witness acknowledges making the statement, or the statement is proved to have been written or signed by him, or given by him as testimony in a former judicial or official hearing, and

(2) When the witness has testified to the same events in a contrary manner at the present proceedings, and

(3) When the party against whom the statement is offered is afforded an opportunity to cross-examine the witness.

The modified rule in Gelhaar admitting certain extrajudicial statements as substantive evidence did not, however, include prior consistent statements, nor did it apply to the prior inconsistent statements of a party's own witness, even if hostile. The limitations on the use of prior inconsistent statements which were retained in Gelhaar were reaffirmed in Irby v. State, 60 Wis.2d 311, 315, 210 N.W.2d 755 (1973).

Under the Wisconsin Rules of Evidence, adopted after the Irby decision, inconsistent statements are not hearsay when the declarant testifies at trial and is subject to cross-examination concerning the statement. Wis. Stat. § 908.01(4)(a)1 states in pertinent part:

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908.01 Definitions. The following definitions apply under this chapter:
. . . .

(4) Statements which are not hearsay. A statement is not hearsay if:
(a) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
1. Inconsistent with his testimony, ...

In Vogel v. State, supra, the supreme court concluded that this new rule of evidence eliminated all impediments to the substantive use of the prior inconsistent statements of a witness:

> We therefore conclude that the court of appeals was correct in its holding that Lindsey's prior inconsistent statement was properly admissible under the Wisconsin Rules of Evidence as substantive evidence against the defendant. The statement in question was inconsistent with Lindsey's testimony at trial and he was available for cross-examination concerning it. Under sec. 908.01(4)(a)1, no more is required. 96 Wis.2d at 386.

See also State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980), in which the court of appeals cited State v. Vogel to support the use of prior inconsistent statements as substantive evidence.

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425 WITNESS EXERCISING PRIVILEGE AGAINST SELF-INCRIMINATION

A witness, (name of witness), exercised the constitutional right not to answer (a question) (questions) on the ground that the answer(s) might tend to incriminate (the witness) (him) (her). You may find by this refusal to answer that the answer(s) would have been against the interest of (the witness) (him) (her).

COMMENT

This instruction was approved in 2010.

Wisconsin has long recognized that a person may invoke the Fifth Amendment privilege against self-incrimination as protection from the adverse use of such evidence in a subsequent criminal action. Grognet v. Fox Valley Trucking Serv., 45 Wis.2d 235, 239, 172 N.W.2d 812 (1969); S.C. Johnson & Son, Inc. v. Morris, 2010 WI App 6, 322 Wis.2d 766, 779 N.W.2d 19. However, in a civil case as distinguished from a criminal case, an inference of guilt or against the interest of the witness may be drawn from the witness invoking the Fifth Amendment. For comparison, see Wis JI-Criminal 317.

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950 REASONABLE DILIGENCE IN DISCOVERY OF INJURY (STATUTE OF LIMITATIONS)

Question ____ asks whether (plaintiff) knew, or should (he) (she) with the exercise of reasonable diligence have known, on or before (date on which statute of limitations would have run) that _____ was a cause of (damage) (injury) to _____.

To answer this question "yes," you must be satisfied that, prior to (date), (plaintiff) knew or with the exercise of reasonable diligence should have known the following:

First, that (he) (she) (suffered damages) (was injured).

Second, that (his) (her) (damages) (injuries) were probably caused by (defendant)'s conduct.

"Reasonable diligence" means the diligence the great majority of persons would use in the same or similar circumstances to discover the cause of the (damages) (injuries).

COMMENT

This instruction and comment were approved in 2009. The comment was updated in 2016.

Gumz v. Northern States Power Company, 2007 WI 135, 305 Wis.2d 263, 742 N.W.2d 271; Schmidt v. Northern States Power Co., 2007 WI 136, 305 Wis.2d 538, 742 N.W.2d 294. Kolpin v. Pioneer Power & Light, 162 Wis.2d 1, 469 N.W.2d 595 (1991); Allen v. Wisconsin Public Service Corp., 2005 WI App 40, 279 Wis.2d 488, 694 N.W.2d 420; Spitler v. Dean, 148 Wis.2d 630, 436 N.W.2d 308 (1989); Christ v. Exxon Mobil Corp., 2015 WI 58, 362 Wis.2d 668, 866 N.W.2d 602.

A cause of action accrues for purposes of determining the statute of limitations when the plaintiff discovers, or with reasonable diligence should have discovered, the injury and that the defendant's conduct probably caused that injury. Borello v. United States Oil Co., 130 Wis.2d 397, 411 (1986); Schmidt v. Northern States Power Company, 2007 WI 136. Discovery occurs when the plaintiff has information that would constitute the basis for an objective belief as to his or her injury and its cause. Claypool v. Levin, 209 Wis. 2d 284 (1997); Schmidt v. Northern States Power, supra.

In Gumz v. Northern States Power Company, supra, the supreme court noted that "(S)tatute of limitations defenses based on failure to exercise reasonable diligence will often present questions of fact appropriate for a jury. When they do, courts should provide separate questions for negligence and reasonable diligence in discovery." (para. 49).

The last paragraph is taken from Allen v. Wisconsin Public Service Corp., 2005 WI App 40, 279 Wis.2d 488, 694 N.W.2d 420.

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1000 UNAVOIDABLE ACCIDENT

COMMENT

The Committee believes that no instruction is needed on this subject since, in most cases, there is some evidence of negligence as to a party, or else it is clear that the party is not negligent.

This comment was approved by the Committee in 1960 and updated in 1984. The comment was reviewed without change in 1989.

It is error to give an unavoidable accident instruction where there is no evidence that the accident resulted other than from negligence. Calhoun v. Lasinski, 255 Wis. 189, 191, 39 N.W.2d 353, 354 (1949); 65 A.L.R. 2d 33 (1949). In Calhoun, the Wisconsin Supreme Court said:

> Defendant admitted applying his brakes hard enough to kill his engine. In view of these facts we can see no justification for submitting an instruction as to "unavoidable accident."

In Mittelstadt v. Hartford Accident & Indem. Co., 2 Wis.2d 78, 86-88, 85 N.W.2d 793, 797-98 (1957), the supreme court held that under the circumstances of this particular case, it is erroneous and prejudicial for the trial court to give an instruction on unavoidable accident.

Skidding does not necessarily warrant the giving of an unavoidable accident instruction. Paul v. Hodd, 271 Wis. 278, 282-84, 73 N.W.2d 412, 415-16 (1955); Abbott v. Truck Ins. Exch. Co., 33 Wis.2d 671, 148 N.W.2d 116 (1967).

When the instruction has been given, it has been held properly given in connection with the cause question, Murray v. Yellow Cab Co., 180 Wis. 314, 318-19, 192 N.W. 1021, 1023 (1923), but improperly in connection with the negligence questions, Mittelstadt, supra at 88.

The form of the instruction frequently approved is in the Murray and Mittelstadt cases. But note that in Linden v. Miller, 172 Wis. 20, 24, 177 N.W. 909, 910 (1920), the first paragraph of this instruction is criticized.

The common law does not impose upon anyone an absolute duty to avoid an accident, and it does not contemplate that all accidents or mishaps must arise as a consequence of fault. Millonig v. Bakken, 112 Wis. 445, 452, 334 N.W.2d 80 (1983).

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1001 NEGLIGENCE: FAULT: ULTIMATE FACT VERDICT

[NOTE: The instruction which follows is for use with a verdict which inquires about the ultimate fact of fault in regard to each party rather than asking about negligence and causation. This form of verdict may be used only if the parties stipulate to its use. Baierl v. Hinshaw, 32 Wis.2d 593, 601, 146 N.W.2d 433 (1966).]

Questions 1 and 2 of the verdict inquire whether the parties to the collision were at fault. "Fault," as used here, involves two elements — negligence and cause. To establish legal fault, the conduct under consideration must be negligent, and it must be a cause of the injury and damages.

(Wis. JI-Civil 1005 Negligence).

In addition to this general definition of negligence, there are rules of law, as well as statutes enacted by the legislature, for the safe operation of motor vehicles, violation of which establishes negligence.

(Here add appropriate instructions on specific kinds of negligence.)

In considering "cause" as an element of fault, you will consider it from the standpoint of relationship of cause and effect between the negligence of either or both parties, if found by you, and the collision and the resulting injuries and damages.

[Give Wis. JI-Civil 1500 Cause]

Before you can find either party at fault, you must be satisfied first, that the party was negligent, as that term has been defined for you, and, second, that such negligence was a substantial factor in producing the collision and the natural results thereof. If you can be so satisfied that either or both parties were at fault, then you will so find — otherwise not.

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After determining whether these parties were or were not at fault, under the instructions I have given you, you will consider and determine what percentage of the fault of each, if found, contributed to the collision and the natural results thereof. Total fault is based on 100%. If you find only one party at fault, then of course, that person's contribution to the collision and the results would be 100%. If you find both parties at fault, then you will consider the fault of each party, weigh its contribution in producing the collision and the results, and fix it in such percentage of the total fault which is proved to be attributable to the person named in the question.

Questions 1 and 2 are to be answered in terms of percentages if the party inquired about is found to be at fault, as that term has been defined to you.

The burden of proof on either question is upon the party who claims another is at fault.

[Wis JI-Civil 200 Burden of Proof]

COMMENT

This instruction was approved by the Committee in 1972. The comment was updated in 1982 and 2003. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

The Committee recommends that this instruction be given only if all parties to the action consent to its use.

In Wisconsin, negligence and causation are separate inquiries. Fondell v. Lucky Stores, Inc., 85 Wis.2d 220, 226, 270 N.W.2d 205 (1978); Grunwald v. Halron, 33 Wis.2d 433, 147 N.W.2d 543 (1966); Baierl, supra.

In 1976, Wis. Stat. § 805.12 was adopted as part of the major revision to the civil procedure rules. This new legislation has raised some question as to whether it altered the rule announced in Baierl that it was error to submit a special verdict question combining negligence and causation into a single question. The court in Baierl relied upon the following statutory language from Wis. Stat. § 270.27 to justify its conclusion that

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negligence and causation could not be combined: "[The] court may submit separate questions as to the negligence of each party, and whether such negligence was a cause. . . ." (Emphasis added.)

The 1976 revision created Wis. Stat. § 805.12 which, according to the Judicial Council Committee note, was "generally based" on Wis. Stat. § 270.27. However, the above-quoted statutory language of § 270.27 which was cited in Baierl was deleted in the 1976 legislation. This deletion gave rise to speculation that the "net effect of redrafting section 805.12(1) appears to be a reversal of Baierl and a restoration of Wisconsin Jury Instruction-Civil Number 1001 as a proper method of submission, irrespective of consent of the parties." John A. Decker & John R. Decker, "Special Verdict Formulation," 60 Marq. L. Rev. 201, 213-14 (1977).

Subsequent to publication of that article, the state supreme court in 1978 adhered to its earlier holdings that "negligence and causation are separate inquiries." Fondell, supra at 226. In a footnote supporting this proposition, the court in Fondell cited the following passage from Grunwald, supra:

> An important aspect of the instructions in a negligence case is the matter of proximate cause, for though there be negligence, liability may extend only for such damages that are proximately caused by the negligence. In a very recent case we held that it was error to submit a negligence case without a separate causation question. Baierl v. Hinshaw (1966), 32 Wis.2d 593, 146 N.W.2d 433. (Emphasis supplied.)

Later in its decision, the court in Fondell, supra at 228, stated that: "Cause and negligence are separable legal concepts predicated on distinct legal tests." The court in Fondell, however, did not engage in the same statutory analysis of § 805.12 and its predecessor § 270.27, as did the commentators in the 1976 article. In addition, the issue in Fondell did not specifically relate to the propriety of Wis JI-Civil 1001. Nevertheless, it can conservatively be stated that the court's preference for separate inquiries on negligence and causation is obvious.

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1002 GAS COMPANY, DUTY TO CUSTOMER

The defendant gas company at the time and place in question had a duty to exercise ordinary care in the manner in which it [inspected (gas pipes) (gas appliances)] [acted after inspecting plaintiff's (gas pipes) (gas appliances)] [repaired plaintiff's (gas pipes) (gas appliances)].

To conform to this standard, the care used must be commensurate with the dangerous consequences which would be reasonably expected from a course of action or inaction. It is common knowledge that natural gas, if not properly contained, is highly explosive and, if permitted to escape, is highly dangerous. Therefore, greater caution and vigilance are required in dealing with this commodity than are required in dealing with ordinary affairs of life and business.

[Select the appropriate following paragraph.]

[If a gas company, such as the defendant, is notified by a customer of a claimed defect in the customer's gas appliance, or in gas pipes leading from the company's meter, and the company knows or should know that if such defect exists it would create a dangerous condition, it is the duty of the gas company to make an inspection of the claimed defect within a reasonable time after notification under all the circumstances then existing. If the company fails to make a proper inspection within a reasonable time, it is negligent.]

[If, on inspection, a defect is found, and the company knows or should know that such defect creates a dangerous situation, it is the duty of the company either to undertake repair of the defect or to shut off the gas supply to enable the owner to have the (gas pipes) (gas appliance) repaired. If the company fails to shut off the gas or to undertake repair of the defective (gas pipes) (gas appliance), it is negligent.]

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[If the company undertakes repair of the defective (gas pipes) (gas appliance), it must conduct such repair operations in a careful, workmanlike manner and within a reasonable time; failure to so repair is negligence.]

COMMENT

This instruction was approved by the Committee in 1972. The comment was updated in 1982 and was reviewed without change in 1989.

Depending on the issues under the evidence, the question will ask about inspection, action after inspection, or repair; the proper paragraph will be used in connection with the question asked.

If there is an issue as to the giving of notice to the gas company, an additional preliminary question is needed.

If the gas pipes or appliances are owned by the customer and are under his control, the gas company cannot be found liable unless it knows or should know that a dangerous condition exists. Weber v. Interstate Light & Power Co., 268 Wis. 479, 482, 68 N.W.2d 39 (1955); Commerce Ins. Co. v. Merrill Gas Co., 271 Wis. 159, 167, 72 N.W.2d 771 (1955); Shaw v. Wisconsin Power & Light Co., 256 Wis. 176, 179, 44 N.W.2d 98 (1949).

As to the duty of the gas company to inspect and repair or to shut off the gas supply once it has received notice of a dangerous defect, see Weber v. Interstate Light & Power Co., supra at 481.

Gas is a dangerous agent, and it is the duty of the gas company to take a high degree of care to avoid injury and damage resulting from its escape. Brown v. Wisconsin Natural Gas Co., 59 Wis.2d 334, 341, 208 N.W.2d 769 (1973). Webb v. Wisconsin S. Gas Co., 27 Wis.2d 343, 350, 137 N.W.2d 407 (1965); Weber v. Interstate Light & Power Co., supra at 481.

When a defect is found, the gas company is not required as a matter of law to shut off the gas supply but may permit a customer to operate the gas appliance manually. Webb v. Wisconsin S. Gas Co., supra at 349.

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1003 NEGLIGENCE, GAS COMPANY, DUTY IN INSTALLING ITS PIPES, MAINS, AND METERS

The defendant gas company at the time and place in question had a duty to exercise ordinary care in the manner in which it (laid its mains) (installed pipes and fittings) (inspected its mains) (repaired its mains).

To conform to this standard, the care used must be commensurate with the dangerous consequences which would be reasonably expected from a course of action or inaction. It is common knowledge that natural gas, if not properly contained, is highly explosive and, if permitted to escape, is highly dangerous. Therefore, greater caution and vigilance are required in dealing with this commodity than are required in dealing with the ordinary affairs of life and business.

[Select the appropriate following paragraph.]

[To comply with this duty, the gas company must install pipes and fittings of good material and workmanship, and it must lay its mains and install its pipes and fittings with reasonable skill and care, having in mind the conditions and circumstances then existing. If the defendant gas company fails to construct good quality pipes and fittings or to install them in a reasonable manner, it is negligent.]

[To comply with this duty, the gas company must make such reasonable inspections as will enable it to discover with reasonable promptness any leaks in its pipes and mains. If the defendant gas company fails to make such reasonable inspections, it is negligent.]

[If the gas company or any of its employees (knows or should know of the existence of a leak in its pipes) (has notice of a possible leak in its pipes), it must, in order to comply with the required standard of care, use reasonable care and diligence (to locate and repair) (in repairing) such defect within a time which is

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reasonable under all of the circumstances then existing. If the defendant gas company fails to reasonably (locate and repair) (repair) such defect within a reasonable time, it is negligent.]

COMMENT

This instruction was approved by the Committee in 1972. The comment was updated in 1982 and 1989.

Wis. Stat. §§ 66.047, 196.745; Wis. Adm. Code Chap. PSC 135; 96 A.L.R.2d 1007 (1964).

See E. L. Chester Co. v. Wisconsin Power & Light Co., 211 Wis. 158, 247 N.W. 861 (1933), concerning the negligent construction of gas mains.

See Larsen v. Wisconsin Power & Light Co., 120 Wis.2d 508, 355 N.W.2d 557 (Ct. App. 1984), for utility's duty to inspect gas appliances.

A gas utility may also be negligent if it fails to use ordinary care to supervise or inspect the work of others digging near its pipes. Brown v. Wisconsin Natural Gas Co., 59 Wis.2d 334, 208 N.W.2d 769 (1973).

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1004 NEGLIGENT VERSUS INTENTIONAL CONDUCT

See JI-Civil 2001.

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1005 NEGLIGENCE: DEFINED

A person is negligent when (he) (she) fails to exercise ordinary care. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.

(For the violation of a safety statute, see Wis JI-Civil 1009.)

COMMENT

This instruction and comment were approved in 1993 and revised in 1999 and 2009. The comment was updated in 2005, 2009, 2012, 2015, and 2016.

Ordinary Care. The Committee believes this instruction is true to the supreme court's concept of negligent behavior expressed in the leading case, Osborne v. Montgomery, 203 Wis. 223, 234 N.W. 372 (1931). The Wisconsin Supreme Court discussed Osborne v. Montgomery in a 2015 decision, Dakter v. Cavallino, 2015 WI 67, 363 Wis.2d 738, 866 N.W.2d 656. In Dakter v. Cavallino, supra, the court reviewed a jury instruction in a case involving a collision between a passenger car and a semi-trailer truck. The negligence instruction given by the trial judge provided:

> . . . It was Defendant's duty to use the degree of care, skill, and judgment which a reasonable semi-truck driver would exercise in the same or similar circumstances having due regard for the state of learning, education, experience, and knowledge possessed by semi-truck drivers holding commercial drivers licenses. A semi-truck driver who fails to conform to this standard is negligent.

The Wisconsin Supreme Court concluded that this jury instruction did not "misstate" the law, but reaffirmed that the standard of care remains "ordinary care" as set forth in Osborne.

The Committee believes that Dakter does not require that a trial judge give a jury instruction on special knowledge or skill. Instead, use of such an instruction is discretionary. It may be given, but Dakter does not mandate its use. The standard of care in Wisconsin negligence cases remains the same, i.e. ordinary care.

Duty. Wisconsin follows the minority opinion in Palsgraf v. Long Island Railroad Co., 162 N.E. 99, (N.Y., 1928) (Andrews, J., dissenting). This view holds that "(e)very one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others." Palsgraf, p. 103; see also Hornback v. Archdiocese of Milwaukee, 2008 WI 98, 313 Wis.2d 294, 752 N.W.2d 862.

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This duty has also been described as an "obligation of due care to refrain from any act which will cause foreseeable harm to others even though the nature of that harm and the identity of the harmed person or harmed interest is unknown at the time of the act." A.E. Investment Corp. v. Link Builders, Inc., 62 Wis.2d 479, 483, 214 N.W.2d 764 (1974).

The duty of care "is established under Wisconsin law whenever it was foreseeable to the defendant that his or her act or omission to act might cause harm to some other person." Gritzner v. Michael R., 2000 WI 68, 235 Wis.2d 781, par. 20, 611 N.W.2d 906. See also Alvarado v. Sersch, 2003 WI 55, 262 Wis.2d 74, 662 N.W.2d 350; Dakter v. Cavallino, supra at ¶ 46.

Violation of Safety Statute. The trial judge must decide whether a safety law applies to the claimed negligent act. If so, then see Wis JI-Civil 1009. A safety law applies if the court determines: 1) the harm inflicted was the type the statute was designed to prevent; (2) the person injured was within the class of persons sought to be protected; and (3) there is some expression of legislative intent that the statute become a basis for the imposition of civil liability. Tatur v. Solsrud, 174 Wis.2d 735, 743, 498 N.W.2d 232 (1993); Antwaun A. v. Heritage Mut. Ins. Co., 228 Wis.2d 44, 64-65, 596 N.W.2d 456 (1999). See also, Grube v. Daun, 210 Wis.2d 681, 563 N.W.2d 523; Burke v. Milwaukee & Suburban Transp. Co., 39 Wis. 2d 682, 690, 159 N.W.2d 700 (1968); McNeil v. Jacobson, 55 Wis.2d 254, 259, 198 N.W.2d 611 (1972); Betchkal v. Willis, 127 Wis.2d 177, 378 N.W.2d 684 (1985); Walker v. Bignell, 100 Wis.2d 256, 301 N.W.2d 447 (1981).

The Wisconsin Supreme Court in Totsky v. Riteway Bus Service, Inc., 233 Wis.2d 371, 391-393 recognized that a violation of a safety statute may be excused by the emergency doctrine, citing Restatement (Second) of Torts § 288A. (The emergency doctrine may apply in traffic cases where management and control is at issue. See Wis JI-Civil 1105A.)

§ 288A provides as follows:

(1) An excused violation of a legislative enactment or an administrative regulation is not negligence.

(2) Unless the enactment or regulation is construed not to permit such excuse, its violation is excused when

- (a) the violation is reasonable because of the actor's incapacity;
- (b) he neither knows nor should know of the occasion for compliance;
- (c) he is unable after reasonable diligence or care to comply;
- (d) he is confronted by an emergency not due to his own misconduct;
- (e) compliance would involve a greater risk of harm to the actor or to others.

The court discussed §§ (1) and (2)(d) and their commentary in reaching the conclusion that the emergency doctrine may excuse a violation of a safety statute. Interpretation of a safety statute or regulation as it relates to the emergency doctrine is a question of law for the court. Totsky, par. 21. If the court determines that the emergency doctrine applies, the jury decides whether the doctrine excuses the conduct. See Wis JI-Civil 1105A.

While § 288A was quoted at length, the court did not discuss §§ (2)(a), (b), (c) or (e). The committee believes that these sections were not "germane to the controversy" in Totsky and were not adopted by the court. See State ex rel. Schultz v. Bruendl, 168 Wis.2d 101, 111-112 (Ct. App., 1992); State v. Holt, 128 Wis.2d 110, 123 (Ct. App., 1985).

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Ski Area Operators and Participants in Snow Sports. For the duties of ski area operators and participants in snow sports, see Wis. Stat. § 895.525 (2011 Wisconsin Act 199). The law sets forth the responsibilities of ski area operators and participants, but also establishes restrictions on civil liability.

Corporate Officer; Business Judgment Rule. A corporate officer may be liable in some situations for non-intentional torts committed in the scope of his or her employment. Casper v. American International South Ins. Co., 2011 WI 81, 336 Wis.2d 267, 800 N.W.2d 880. The court, in Casper, noted that the "business judgment rule" expressed in Einhorn v. Culea, 2000 WI 65, 235 Wis.2d 646, 612 N.W.2d 78, and in Wis. Stat. § 180.0826 defines a corporate officer's duties to shareholders, not to third parties. Thus, it held the rule does not necessarily immunize a corporate executive from liability for negligence. Nevertheless, the court noted that the existence of the rule reflects public policy that corporate officers are allowed some latitude to make wrong decisions without subjecting themselves to personal liability.

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1006 GROSS NEGLIGENCE: DEFINED

Gross negligence is conduct involved in (the operation of an automobile) which shows either a willful intent to injure or reckless and wanton disregard of the rights, safety, or property of another person.

You may consider the defendant's conduct in any of its aspects (such as the speed at which (defendant) was driving) to determine whether it was wanton or reckless conduct (whether it showed willful intent to injure).

[Wis JI-Civil 205 Burden of Proof: Middle.]

COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 2002 to correct the reference to the burden of proof and update the comment. The instruction and comment were revised in 2015 to replace the terms, "guilty of" and "guilt." The instruction and comment were revised in 2016.

Gross negligence is no longer a part of Wisconsin common law. Bielski v. Schulze, 16 Wis.2d 1, 114 N.W.2d 105 (1962). It remains a part of Wisconsin statutory law. Wis JI-Civil 1006 is retained for whatever use may be made of it in the trial of cases in which foreign law on gross negligence is to be applied. See Brunke v. Popp, 21 Wis.2d 458, 124 N.W.2d 642 (1963), and Parchia v. Parchia, 24 Wis.2d 659, 130 N.W.2d 205 (1964).

In addition, the Wisconsin Legislature has brought the concept of gross negligence back into Wisconsin law over the last twenty years. See, as examples, Wis. Stat. § 895.4802 (civil liability for discharge of hazardous materials), Wis. Stat. § 118.2925 (civil liability for school officials regarding the use of epinephrine auto-injectors), and Wis. Stat. § 118.293 (concerning civil liability for school officials regarding an athlete who has a concussion). While none of those statutes define "gross negligence," it is the Committee's opinion that it is reasonable to assume the Legislature intended the term to have the meaning previously stated in case law.

This instruction may also be of use in cases arising under Wisconsin statutes which impose civil liability for conduct which is akin to or the equivalent of gross negligence. See, for example, uses of the phrase "willful or wanton," and similar phrases, in Chapter 895 of the Wisconsin Statutes.

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1007 CONTRIBUTORY NEGLIGENCE: DEFINED

Every person in all situations has a duty to exercise ordinary care for his or her own safety. This does not mean that a person is required at all hazards to avoid injury; a person must, however, exercise ordinary care to take precautions to avoid injury to himself or herself.

ADDITIONAL OR OPTIONAL PARAGRAPHS

(A person must exercise ordinary care to employ (his) (her) senses of sight and hearing so as to become aware of the existence of danger to (him) (her). A failure to do so is negligence.)

(It is the duty of every person to exercise ordinary care to recognize and appreciate all dangers that are open and obvious to (him) (her) or which should have been recognized and appreciated by a reasonably prudent person under the same or similar circumstances. That the warning of the existence of danger was not seen or was not heard does not free one from negligence. In addition, one who looks and fails to see, or listens and fails to hear, a warning of danger which under like or similar circumstances would have been seen or heard by a reasonably prudent person is as negligent as one who did not look or listen at all.)

(However, a person is not bound to see every hazard or danger in his or her pathway even though they should be plainly observable nor to remember the existence of every condition of which the person has had knowledge. A person is only required to act as a reasonably prudent person would act under the same or similar circumstances.)

(To be free of negligence, a person must exercise ordinary care in choosing his or her course of conduct and in the pursuit of that choice. A person is not negligent in making a

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choice of conduct if the person has no knowledge that one course of conduct carries a greater hazard than another, provided that the lack of knowledge is not the result of the person's failure to exercise ordinary care.)

(Insert Wis JI-Civil 1015, Negligence in an Emergency, if applicable.)

COMMENT

This instruction and comment were approved in 1974. The Committee revised this instruction in 2014 to replace the term, "guilty of negligence." The comment was updated in 1989, 2000, 2003, 2004, and 2012.

A party has a right to an instruction relating to the contributory negligence of an opponent, even though an instruction on negligence generally (Wis JI-Civil 1005) is given. Raszeja v. Brozek Heating & Sheet Metal Corp., 25 Wis.2d 337, 343, 130 N.W.2d 855 (1964).

Note that some of the above optional paragraphs are framed in general terms while others are pointed at particular fact situations. Some other contributory negligence issues are dealt with specifically elsewhere in Wisconsin Jury Instructions-Civil (e.g., Wis JI-Civil 1046, Contributory Negligence of Passenger: Placing Self in Position of Danger; and Wis JI-Civil 1047, Contributory Negligence of Guest: Riding with Host; Wis JI-Civil 1047.1, Contributory Negligence of Guest: Active; Wis JI-Civil 1048, Contributory Negligence: Highway Defect; Wis JI-Civil 1049, Contributory Negligence: Sidewalk Defect; Wis JI-Civil 1902, Safe Place Statute: Negligence of Plaintiff Frequenter).

Passive and Active Negligence. In Johnson v. Cintas Corp. No. 2., Appeal No. 2013AP2323 (Recommended for publication), the court of appeals said that asking the jury to separately consider the plaintiff's "passive" and "active" negligence "could have been more confusing than helpful."

Recreational Participants. In April 1988, the Wisconsin Legislature enacted legislation which affects the civil liability of owners of recreational property. 1987 Wisconsin Act 377. The act imposes standards of conduct on persons who participate in indoor and outdoor recreational activities with respect to the legal responsibility for injuries that are incurred while engaging in these activities. According to the act, "recreational activity" means any activity undertaken for the purpose of exercise, relaxation, or pleasure, including practice or instruction in any activity. The act includes a long list of activities included within the definition of "recreational activity." The act codifies an "appreciation of risk" doctrine which arguably already exists in common law as contributory negligence. Under the act, a participant in a recreational activity must:

1. act within the limits of his or her ability;
2. heed all warnings
3. maintain control of his or her person and the equipment, devices, or animals used while participating in the activity; and

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4. refrain from acting in a manner that may cause or contribute to injury to himself or herself or other persons while participating in the recreational activity.

A violation of these responsibilities constitutes negligence and is subject to the comparative negligence statute.

Participants in Snow Sports. For the duties of ski area operators and participants in snow sports, see Wis. Stat. § 895.525 (2011 Wisconsin Act 199). The law sets forth the responsibilities of ski area operators and participants, but also establishes restrictions on civil liability.

Mentally Disabled Persons. For the contributory negligence of a mentally disabled person under care and custody, see Wis JI-Civil 1021 and Hofflander v. St. Catherine's Hospital, 2003 WI 77, 262 Wis.2d 539, 664 N.W.2d 545. In Hofflander, the supreme court recognized the concept of "subjective" contributory negligence. The Civil Jury Instructions Committee will be reviewing the Hofflander decision in 2004 to develop an instruction consistent with the decision.

Medical Informed Consent. See Wis JI-Civil 1023.4 for a comment on the issue of contributory negligence by a plaintiff in a duty to inform a patient case.

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1007.5 CONTRIBUTORY NEGLIGENCE: RESCUE RULE

[Give Wis JI-Civil 1005 & 1007.]

A person is not negligent in attempting to make a rescue if the following circumstances are found to exist:

1. That the person to be rescued was actually in imminent danger of death or injury or it appeared to the plaintiff, in the exercise of ordinary care, that the person was in imminent danger; and
2. That in deciding whether to attempt to make the rescue, the plaintiff acted as a reasonably prudent person even though there was no certainty of success in accomplishing the rescue; and
3. That in carrying out the rescue attempt, the person used ordinary care with respect to the means and manner of making the rescue.

In determining whether the plaintiff used ordinary care, you should consider the alarm, excitement, and confusion, if any, the uncertainty of the means to be employed in the rescue, and the apparent necessity for immediate action, together with all other surrounding circumstances that bear upon the reasonableness of the rescue attempt.

COMMENT

This instruction and comment were approved by the Committee in 1981. The comment was updated in 2016.

Cords v. Anderson, 80 Wis.2d 525, 259 N.W.2d 672 (1977); 65A C.J.S. Negligence § 124 (1966). The "rescue doctrine" is separate from the "emergency doctrine." Cords, supra at 246. The rescue doctrine is applicable even though the action of the rescuer is deliberate and taken after some planning and consideration.

For the relationship between the rescue rule and emergency doctrine, see Kelly v. Berg, 2015 WI App 69, 365 Wis.2d 83, 870 N.W.2d 481; Cords v. Anderson, 80 Wis.2d 525, 259 N.W.2d 672 (1977).

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1008 INTOXICATION: CHEMICAL TEST RESULTS [REFLECTS CHANGES IN 2003 WISCONSIN ACT 30]

The results of a chemical test for intoxication have been received in evidence.

(NOTE: USE THE APPROPRIATE PARAGRAPH):

[If you find there was an alcohol concentration of more than 0.04 but less than 0.8 at the time of the test, you should consider that fact as relevant evidence on the issue of whether the person (was under the influence of an intoxicant) (had an alcohol concentration of 0.8 or more) at the time in question, but it is not by itself a sufficient basis for a finding that the person (was under the influence of an intoxicant) (had an alcohol concentration of 0.8 or more) at the time in question.]

[If you find there was an alcohol concentration of 0.8 or more at the time of the test, you should find from that fact alone that the person was under the influence of an intoxicant at the time in question, unless you are satisfied to the contrary from other evidence.]

[If you find there was an alcohol concentration of more than 0.00 but less than 0.8 at the time of the test, you should consider that fact as relevant evidence on the issue of whether the person was under the combined influence of alcohol and (a controlled substance) (a controlled substance analog) (any other drug) at the time in question, but it is not by itself a sufficient basis for a finding that the person was under the combined influence of alcohol and (a controlled substance) (a controlled substance analog) (any other drug) at the time in question.]

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COMMENT

[REPORTER'S NOTE: This instruction reflects the changes to alcohol concentration in 2003 Wis. Act 30. This act took effect on September 30, 2003. For a case in which the prior law applies, change "0.08" to "0.1."]

This instruction and comment were originally published in 1961. They were revised in 1974, 1983, 1989, 1994, 1996, 2000, and 2003.

Evidence of chemical tests for intoxication is generally admissible if intoxication is at issue. Wis. Stat. § 885.235(1g). But if the sample (blood, breath, or urine) was taken more than three hours after the event, the analysis is admissible only if expert testimony establishes its probative value and may be given prima facie effect only if established by expert testimony. Wis. Stat. § 885.235(3).

With regard to the operation of a commercial motor vehicle, Wis. Stat. § 885.235(1g)(d) indicates that an alcohol concentration of 0.04 or more is prima facie evidence that he or she was under the influence of an intoxicant with respect to operation of a commercial motor vehicle and is prima facie evidence that he or she had an alcohol concentration of 0.04 or more.

"The provisions of this section relating to the admissibility of chemical tests for alcohol concentration or intoxication shall not be construed as limiting the introduction of any other competent evidence bearing on the question of whether or not a person was under the influence of an intoxicant. . . ." Wis. Stat. § 885.235(4).

See also Wis JI-Criminal 230, 232, 234, 235, 237, 1185, 1185A, 1186 1186A, 1188, 1190, and 1191 for jury instructions dealing with chemical test results.

Prima Facie Evidence. In drafting this instruction, the question arose whether "prima facie evidence" was the same as presumption. Wis. Stat. § 903.01 makes clear that it is. The statute reads:

> Except as provided by statute, a presumption recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts, imposes on the party relying on the presumption the burden of proving the basic facts, but once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. (Emphasis added.)

Wis Stat. § 885.235(1g)(c) is a statutory provision that makes a chemical test showing an alcohol concentration of 0.1 or more (the basic facts) "prima facie evidence" of being under the influence of an intoxicant (the other fact). Wis. Stat. § 903.01 makes this statutory provision a presumption. Wis. Stat. § 903.01 makes clear, also, that the introduction of the basic fact establishes the presumed fact for the jury and shifts the burden to the opposing party to overcome or rebut the presumption.

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In terms of meeting the presumption, Chief Justice Heffernan's words in Kruse v. Horlamus Indus., Inc., 130 Wis.2d 357, 365-66, 387 N.W.2d 64 (1986) are instructive"

> Under Wisconsin law, presumptions do not "disappear" or "burst" when evidence to the contrary of the presumed fact is introduced. This means that, even where rebutting evidence has been produced, the inference from the presumption survived and is sufficient to support a jury verdict until the presumption is met by evidence of equal weight.

This language supports the use of "should" in the civil instruction ("you should find from that fact alone that the person was under the influence of an intoxicant") rather than the permissive "may"used in the criminal instruction; it also supports the language "unless you are satisfied from other evidence to the contrary" because the presumption shifts the burden of production.

Civil/Criminal Distinction. In drafting this instruction, the Committee recognized that there is a distinction between Wis JI-Criminal 230 and Wis JI-Civil 1008. The Committee believes that Wis. Stat. § 903.01 supports the slightly different treatment in the civil instruction. Wis. Stat. § 903.03(3) supports the criminal instruction and indicates why the criminal instruction is worded as it is. The statute provides in the most relevant section:

> (3) Instructing the jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt. (Emphasis added.)

The criminal instruction must use the permissive "may" and the cautionary adjunct because of the higher burden of proof. The instruction also must instruct that the jury can only rely on the presumed fact if all the evidence proves the presumed fact beyond a reasonable doubt. The instruction may not suggest that the burden shifts to the defendant to overcome or rebut the presumption.

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1009 NEGLIGENCE: VIOLATION OF SAFETY STATUTE

Violation of a safety (statute) (regulation) (ordinance) is negligence as that term is used in the verdict questions and my instructions. (Plaintiff) claims that (defendant) violated a safety (statute) (regulation) (ordinance) that provides:

> [Read appropriate motor vehicle jury instruction applicable to the facts or summarize or read statute, administrative rule, or ordinance at issue]

If you determine that (defendant) violated this safety (statute) (regulation) (ordinance), the violation is negligence.

COMMENT

The instruction and comment were approved in 2009. Conduct is negligent either because it will foreseeably cause harm, or because it violates a safety statute where the statutory purpose is to avoid or diminish the likelihood of harm that resulted. Koback v. Crook, 123 Wis.2d 259, 276, 366 N.W.2d 857, 865 (1985).

Before giving this instruction, the trial judge must decide whether the safety law applies to the claimed negligent act. A safety law applies if the court determines: 1) the harm inflicted was the type the statute was designed to prevent; (2) the person injured was within the class of persons sought to be protected; and (3) there is some expression of legislative intent that the statute become a basis for the imposition of civil liability. Tatur v. Solsrud, 174 Wis.2d 735, 743, 498 N.W.2d 232 (1993); Antwaun A. v. Heritage Mut. Ins. Co., 228 Wis.2d 44, 64-65, 596 N.W.2d 456 (1999). See also, Grube v. Daun, 210 Wis.2d 681, 563 N.W.2d 523; Burke v. Milwaukee & Suburban Transp. Co., 39 Wis. 2d 682, 690, 159 N.W.2d 700 (1968); McNeil v. Jacobson, 55 Wis.2d 254, 259, 198 N.W.2d 611 (1972); Betchkal v. Willis, 127 Wis.2d 177, 378 N.W.2d 684 (1985); Walker v. Bignell, 100 Wis.2d 256, 301 N.W.2d 447 (1981).

Excused Violation of Safety Statute. The Wisconsin Supreme Court in Totsky v. Riteway Bus Service, Inc., 233 Wis.2d 371, 391-393 recognized that a violation of a safety statute may be excused by the emergency doctrine, citing Restatement (Second) of Torts § 288A. (The emergency doctrine may apply in traffic cases where management and control is at issue. See Wis JI-Civil 1105A.)

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§ 288A provides as follows:

(1) An excused violation of a legislative enactment or an administrative regulation is not negligence.

(2) Unless the enactment or regulation is construed not to permit such excuse, its violation is excused when

(a) the violation is reasonable because of the actor's incapacity;

(b) he neither knows nor should know of the occasion for compliance;

(c) he is unable after reasonable diligence or care to comply;

(d) he is confronted by an emergency not due to his own misconduct;

(e) compliance would involve a greater risk of harm to the actor or to others.

The court discussed §§ (1) and (2)(d) and their commentary in reaching the conclusion that the emergency doctrine may excuse a violation of a safety statute. Interpretation of a safety statute or regulation as it relates to the emergency doctrine is a question of law for the court. Totsky, par. 21. If the court determines that the emergency doctrine applies, the jury decides whether the doctrine excuses the conduct. See Wis JI-Civil 1105A.

While § 288A was quoted at length, the court did not discuss §§ (2)(a), (b), (c) or (e). The committee believes that these sections were not "germane to the controversy" in Totsky and were not adopted by the court. See State ex rel. Schultz v. Bruendl, 168 Wis.2d 101, 111-112 (Ct. App., 1992); State v. Holt, 128 Wis.2d 110, 123 (Ct. App., 1985).

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1010 NEGLIGENCE OF CHILDREN

As a child, (_____), was required to use the degree of care which is ordinarily exercised by a child of the same age, intelligence, discretion, knowledge, and experience under the same or similar circumstances.

In determining whether (child) exercised this degree of care, you should consider the child's instincts and impulses with respect to dangerous acts, since a child may not have the prudence, discretion, or thoughtfulness of an adult.

COMMENT

This instruction was approved in 1974. It was revised in 1986. The comment was revised in 1988, 1994, and 1995. A citation was corrected in 2014.

This instruction is taken substantially from Brice v. Milwaukee Auto Ins. Co., 272 Wis. 520, 76 N.W.2d 337 (1956). See also Goldberg v. Berkowitz, 173 Wis. 608, 181 N.W. 216 (1921). The second paragraph, in substance, was approved in Rasmussen v. Garthus, 12 Wis.2d 203, 206, 107 N.W.2d 264 (1961).

The use of a child's instincts and impulses was approved in Statz v. Pohl, 266 Wis. 23, 31, 62 N.W.2d 556 (1954), although the issue in that case was not contributory negligence of the child but rather that of the parent.

This rule applies to defendants as well as to plaintiffs. Huchting v. Engel, 17 Wis. 237 (1863); Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891); Heath v. Madsen, 273 Wis. 628, 79 N.W.2d 73 (1956); Briese v. Maechtle, 146 Wis. 89, 130 N.W. 893 (1911); Wisconsin Loan & Fin. v. Goodnough, 201 Wis. 101, 228 N.W. 484 (1930); Restatement, Second, Torts §§ 283 and 464 (1934, Supp. 1948); 173 A.L.R. 883 (1948).

A reading of Wis. Stat. § 891.44, Presumption of lack of contributory negligence for infant minor (under 7), should not be included if this instruction is given. Gremban v. Burke, 33 Wis.2d 1, 8, 146 N.W.2d 453 (1966).

Under Wis. Stat. § 891.44, a child under seven is presumed to be incapable of negligence. A child over seven is capable of negligence, although by a lesser standard of care than an adult. Rossow v. Lathrop, 20 Wis.2d 658, 663, 123 N.W.2d 523 (1963); Gonzalez v. City of Franklin, 128 Wis.2d 485, 383 N.W.2d 907 (Ct. App. 1986). Between the age of seven and the age of majority, neither common law nor statutory law creates any further age classifications regarding the acts of minors. Therefore, the care of a minor over

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seven years is measured against the degree of care which children of the same age ordinarily exercise, under the same circumstances, taking into account the experience, capacity, and understanding of the child.

The only exception to this rule arises where the child engaged in an activity which is typically engaged in only by adults and for which adult qualification or a license is required. Restatement, Second, Torts § 283A, p. 16, note b (1965). In such a situation, the child will be held to the standard of adult skill, knowledge, and competence, and no allowance will be made for the child's immaturity. Strait v. Crary, 173 Wis.2d 377, 496 N.W.2d 634 (Ct. App. 1992); Hoff v. Wedin, 170 Wis.2d 443, 489 N.W.2d 646 (Ct. App. 1992).

In cases where a safety statute has been violated, the issue also arises whether a child can be held negligent as a matter of law (negligence per se) regardless of age. Restatement of Torts states that where an actor does not have the capacity, because of immaturity, to comply with safety legislation, the child's violation of the safety legislation will ordinarily be excused. Section 288A, Note e, p. 35 (1965). However, in Shaw v. Wuttke, 28 Wis.2d 448, 460, 137 N.W.2d 649 (1965), the court held that "the legal effect of a violation of a safety statute is visited upon adults and minors alike and there is no limiting or conditional application to a child of seven and one-half years." Citing Miller v. Keller, 263 Wis. 509, 57 N.W.2d 711 (1953). In Gonzalez v. City of Franklin, 137 Wis.2d 109, 403 N.W.2d 747 (1987), the supreme court held that a Wisconsin safety statute regulating the sale and use of fireworks excludes from its coverage the detonation by a seven-year-old boy of a firework which he believes to be a smoke bomb and which he discovered only through the negligence of the party claiming the benefit of the statute.

For apportioning negligence between an adult and a child, see Wis JI-Civil 1582, Comparative Negligence: Adult and Child.

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1011 ATTRACTIVE NUISANCE: ULTIMATE FACT QUESTION

This instruction was revised and renumbered in 2012 following the enactment of Wis. Stat. § 895.529 (2011 Wisconsin Act 93). A claim based on attractive nuisance is covered in Wis JI-Civil 8025. Previously, Wis JI-Civil 1011 was based on common law established in Christians v. Homestake Enterprises, Ltd., 101 Wis.2d 25, 303 N.W.2d 608 (1981).

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1012 PARENTS' DUTY TO PROTECT MINOR CHILD

Parents must use ordinary care to protect their children from dangers which are known or should have been known or anticipated by the parents. Although parents are not required to do the impossible in keeping their children safe, they must use ordinary care to see that their children are given reasonable protection from hazards and dangers, and their duty increases where special circumstances exist.

In determining whether (a parent) (parents) used ordinary care to protect (his) (her) (their) child(ren), you may consider the age of the child(ren) and the traits and disposition of children of that age. You should also consider that parents are expected to know the traits and dispositions of their children.

COMMENT

This instruction was approved in 1974 and revised in 1985. The comment was reviewed without change in 1989.

Reber v. Hanson, 260 Wis. 632, 635, 51 N.W.2d 505, 507 (1952); Hansberry v. Dunn, 230 Wis. 626, 284 N.W. 556 (1939); Matson v. Dane County, 177 Wis. 649, 189 N.W. 154 (1922); Monrean v. Eastern Wis. Ry. & Light Co., 152 Wis. 618, 623, 140 N.W. 309-10 (1913); Ewen v. Chicago & N.W. Ry., 38 Wis. 613, 628 (1875).

The duty of the parents is ordinarily joint, as where both had a duty to be aware of the whereabouts of a child playing in the yard; in such a case, the negligence in the comparison question is not divisible but must be assessed as a unit. Reber, supra. If one parent clearly is not negligent, as in the case of a father who is not present while the child is riding with its mother, the negligence of the mother will not be imputed to the father. Hansberry, supra.

While the court, in Bell v. Duesing, 275 Wis. 47, 80 N.W.2d 821 (1957), intimates that it is improper to inquire about the negligence of a parent who is not a party to the action, the better rule would seem to be contra under the general theory that the negligence of a nonparty may be inquired into.

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1013 PARENT'S DUTY TO CONTROL MINOR CHILD

A parent must use ordinary care to control (his) (her) minor child so as to prevent the child from intentionally harming others or from conducting (himself) (herself) so as to create an unreasonable risk or bodily harm to others, if the parent knows or should know:

(1) that (he) (she) has the ability to control the child;

(2) that there is a necessity for exercising such control; and

(3) that there is an opportunity to do it.

A parent is not required to anticipate and guard against every logically possible instance of a child's misconduct. The parent must know, or should have known, that the child had a habit of engaging in the particular act or course of conduct which led to the plaintiff's injury.

COMMENT

This instruction and comment were initially published in 1974 and revised in 1984 and 2005. The comment was updated in 2002 and 2005.

This instruction is to be used in cases involving a claim of negligent failure to control a child. It is not to be used in a "negligent entrustment" type case.

This instruction is taken substantially from Restatement, Second, Torts § 316 (1965) as a correct statement of the law in Gerlat v. Christianson, 13 Wis.2d 31, 35, 108 N.W.2d 194 (1961); Statz v. Pohl, 266 Wis. 23, 31, 62 N.W.2d 556 (1954); and Siebert v. Morris, 252 Wis. 460, 463, 32 N.W.2d 239 (1948). See also Pawlack v. Mayer, 266 Wis. 55, 62 N.W.2d 572 (1954); Bruttig v. Olsen, 154 Wis.2d 270, 453 N.W.2d 153 (Ct. App. 1989). Gritzner v. Michael R. 235 Wis.2d 781, 611 N.W.2d 906, 2000 WI 68; Nielsen v. Spencer, 2005 WI App 207.

The duty extends to either parent who has an ability to control the child. Restatement, Second, Torts § 316 (1965); Siebert v. Morris, supra at 463.

In cases involving failure to control, as in negligent entrustment cases, the parent who has failed to exercise proper control is treated as a joint tortfeasor, whose separate act of negligence, for the imposition of liability, only becomes relevant upon the negligent act and injury by the child who should have been controlled. Bankert v. Threshermen's Mut. Ins. Co., 110 Wis.2d 469, 329 N.W.2d 150 (1983).

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The tort differs from that of negligent entrustment, however. Although both the tort of negligent entrustment and of failure to control a child generally involve children improperly using an instrumentality which can be dangerous, entrustment requires that the instrumentality be "entrusted" to the entrustee. Negligent control may be the failure to exercise ordinary care in allowing the instrumentality to be in the hands of a child, or it may be a failure in other respects, e.g., failure to properly instruct in use or a failure to warn of hazards.

The four general situations resulting in parental liability at common law are: (1) Where the parent negligently entrusts the child with an instrumentality which may become a source of danger to others; (2) where the child is acting as the parent's agent; (3) where the parent knows of the child's wrongdoing and consents to it or directs or sanctions it; and (4) where the parent who has the ability to control the child fails to exercise control over the child, although the parent knows, or should know, that injury to another is a probable consequence.

In Nielsen, supra, the court noted that the parent's duty under Restatement (Second) of Torts § 316 (1965) has been interpreted narrowly in Wisconsin and elsewhere. Mere knowledge by the parent of a child's mischievous and reckless, heedless, or vicious disposition is not of itself sufficient to impose liability with respect to torts of the child. Consequently, the court in Nielsen agreed that "no parental liability exists without notice of a specific type of harmful conduct and an opportunity to interfere with it." Nielsen, supra, ¶ 14.

Loco Parentis. A claim for negligent failure to control a minor child also may be based on the doctrine of loco parentis. Gritzner, 2000 WI 68, ¶ 48. In Gritzner, the court found that a friend of the mother of a minor who committed sexual abuse had assumed parental responsibility.

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1014 NEGLIGENT ENTRUSTMENT

To find (defendant) negligent in permitting _____ to use (the object), you must find that:

1. (defendant) was initially in control of (the object);
2. (defendant) permitted _____ to use (the object); and
3. (defendant) either knew or in the exercise of ordinary care should have known that _____ intended or was likely to use (the object) in a way that would create an unreasonable risk or harm to others.

COMMENT

This instruction was approved in 1985. The comment was updated in 1995, 1998, 2002, and 2017.

Bankert v. Threshermen's Mut. Ins. Co., 110 Wis.2d 469, 329 N.W.2d 150 (1983); Restatement, Second, Torts § 308 (1965). See also Kempf v. Boehring, 95 Wis.2d 435, 290 N.W.2d 562 (Ct. App. 1980); Bruttig v. Olsen, 154 Wis.2d 270, 453 N.W.2d 153 (Ct. App. 1989); Erickson v. Prudential Ins. Co., 166 Wis.2d 82, 479 N.W.2d 552 (Ct. App. 1991); Johnson v. Cintas Corp. No. 2, 2015 WI App 14, 360 Wis.2d 350, 860 N.W.2d 515.

This instruction applies only to situations when the person who is negligently entrusted with an item or activity injures someone else. Stehlik v. Rhoads, 2002 WI 73, 253 Wis.2d 477, 645 N.W.2d 889; Johnson v. Cintas Corp. No. 2, supra. It does not apply to self-inflicted injuries.

This type of claim is not limited to parental liability. Bankert, supra at 475-76.

For liability to result, the negligence of the entruster and the entrustee must result in the injury. Bankert, supra.

For a discussion of the difference between a claim based on negligent entrustment and a claim based on failure to control, see Comment to Wis JI-Civil 1013.

Failure to Supervise or Properly Instruct a Juvenile in Hunting Procedures. In Kramschuster v. Shawn E., 211 Wis.2d 697, 565 N.W.2d 581 (Ct. App. 1997), the plaintiff based its tort claim on the defendant's failure to supervise or properly instruct a juvenile in regard to safe hunting procedures. The court said that because under the circumstances of the case no duty to supervise or instruct the juvenile was created between the parties or assumed by the defendant and no such duty was imposed by law, the court of appeals concluded that there was no duty for the defendant to supervise or instruct the juvenile in regard to the deer hunt. The court said the failure to reiterate basic hunting rules to an independent member of the hunting

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party does not create a foreseeable unreasonable risk of injury to another person under the facts of the case. The court of appeals, however, said that while the law may imply a duty of supervision when the experience, age, or other factors of a child's engaging in a hunt may suggest such supervision is necessary, those were not the facts of the case before it in Kramschuster v. Shawn E. The court concluded that the defendant had no special duties of supervision, control, or responsibility over the juvenile hunter because of the juvenile's experience in certification as a hunter authorized by law to engage in the hunting of deer. 211 Wis.2d 697, at 706.

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1014.5 NEGLIGENT ENTRUSTMENT TO AN INCOMPETENT PERSON

To find (defendant) negligent in supplying (object) to (plaintiff), you must find that:

1. the (object) was under the control of (defendant);
2. (defendant) supplied (object) to (plaintiff) directly or through a third person; and
3. at the time the (object) was supplied to (plaintiff) (defendant) knew, or in the exercise of reasonable care should have known (plaintiff) was likely, because of (lack of capacity) (youth) (inexperience) (or otherwise) to use the (object) in a way that would create an unreasonable risk of harm to (himself/herself), others, or their property.

COMMENT

This instruction and comment were approved in 2004. The comment was revised in 2016.

This instruction is based on Restatement (Second) of Torts, § 390. See Stehlik v. Rhoads, 2002 WI 73, 253 Wis.2d 477, 645 N.W.2d 889; Erickson v. Prudential Ins. Co., 166 Wis.2d 82, 479 N.W.2d 552 (Ct. App. 1991).

Restatement (Second) of Torts, § 390 reads:

> § 390. Chattel for Use by Person Known to be Incompetent
> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely [because of his youth, inexperience, or otherwise,] to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Restatement (Second) of Torts § 390 is a special application of the rule stated in § 308. Section 308 applies when the person who is negligently entrusted with an object or activity injures another person. Section 390, on which this instruction is based, deals with the supplying of a chattel to a person incompetent to use it safely who subsequently injures himself or herself or another person or property. See Restatement (Second) of Torts § 390, comment b, and Stehlik v. Rhoads, 2002 WI 73, ¶ 22, 253 Wis.2d 477, 645 N.W.2d 889.

The court in Stehlik explained the difference between a claim based on § 308 and a claim under § 390:

> ¶ 23. A § 308 claim is a bit broader, and can be asserted any time the circumstances are such that the defendant knew or should have known that the person to whom he is

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entrusting an item is likely to use it in a way that creates an unreasonable risk of harm to others. But § 308 has never been extended to cases such as this one involving self-inflicted harm by the one to whom an item is allegedly negligently entrusted.

For contributory negligence, see Wis. JI-Civil 1008.

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1015 NEGLIGENCE IN AN EMERGENCY

Instruction renumbered JI-Civil 1105A.

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1019 NEGLIGENCE: EVIDENCE OF CUSTOM AND USAGE

Evidence has been received as to the (practice in the community) (custom in the trade or work operation) (practice in the industry) with respect to (e.g., the use of 2 x 4's for rafters) (installations of 3/8" plywood for subflooring) (standing on running board to guide truck backing into shale pit). You should consider this evidence in determining whether (defendant) acted with ordinary care. This evidence of practice is not conclusive as to what meets the required standard for ordinary care or reasonable safety. What is generally done by persons engaged in a similar activity has some bearing on what an ordinarily prudent person would do under the same or like circumstances. Custom, however, cannot overcome the requirement of reasonable safety and ordinary care. A practice which is obviously unreasonable and dangerous cannot excuse a person from responsibility for carelessness. On the other hand, a custom or practice which has a good safety record under similar conditions could aid you in determining whether (defendant) was negligent.

COMMENT

This instruction was originally approved in 1974 and revised in 1985. The instruction and comment were updated in 1995.

Raim v. Ventura, 16 Wis.2d 67, 113 N.W.2d 827 (1962); Kalkopf v. Donald Sales & Mfg. Co., 33 Wis.2d 247, 147 N.W.2d 277 (1967).

This instruction was approved as a correct statement of the law in Victorson v. Milwaukee & Suburban Transp. Corp., 70 Wis.2d 336, 351, 234 N.W.2d 332 (1975). See also D.L. v. Huebner, 110 Wis.2d 581, 329 N.W.2d 890 (1983). In D.L. v. Huebner, supra, the court recommended that where there is evidence of a difference in pre- and post-manufacture industry custom, the instruction can be revised to state how the jury should consider the evidence.

See also Kolpin v. Pioneer Power & Light, 162 Wis.2d 1, 469 N.W.2d 595 (1991), in which the court affirmed the trial court's use of this instruction to explain the standard of care required in furnishing electricity to customers. The text of an instruction, proposed by the utility company and not given by the trial court, is set forth in a footnote. Kolpin, supra, at 31, n.6. Kolpin also discusses whether an instruction on the state-of-the-art of electricity should have been given. Kolpin, supra, at 31-35.

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1020 NEGLIGENCE: UNDER SPECIAL CIRCUMSTANCES

[Withdrawn]

COMMENT

This instruction was approved by the Committee in 1960. It was withdrawn in 2011.

At the time the instruction was withdrawn, it read:

> [While the rule never changes that a (person) (motor vehicle driver) (pedestrian) must exercise ordinary care, the degree of care or diligence which a person must exercise to come up to the standard of ordinary care varies with the circumstances naturally calculated to affect or increase the hazard of collision or injury. The greater the danger which is or may be apparent to an ordinarily prudent person under the circumstances existing, the greater must be the degree of care which must be used to guard against such danger.]
>
> [Alternative: The ordinary care which the law requires varies with the circumstances naturally calculated to affect or increase the hazard of injury or collision. (Under some circumstances, ordinary care may be a high degree of caution; whereas, under other circumstances, a slight degree of caution may be ordinary care.) The greater the danger which is or may be apparent to an ordinarily prudent person under the circumstances existing, the greater must be the degree of care which must be used to guard against such danger.]

Wisconsin Jury Instruction-Civil 1005 defines the standard of care of a negligent person. The instruction provides as follows:

> A person is negligent when (he) (she) fails to exercise ordinary care. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.

Wisconsin has been committed to the ordinary care standard formulation in negligence cases. Justice Heffernan summarized the formulation of negligence in Smith v. Milwaukee County, 162 Wis.2d 340, pp 355-360 (1990). While Justice Heffernan's summary is found in a dissent, the court's differences were not based on the negligence formulation, but were instead based on the belief that the majority was mistaken in ruling that there were no disputed issues of fact which would permit a finding of negligence.

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Professor Richard Campbell was critical of formulations which deviate from the ordinary care standard because of special circumstance. In his article entitled "Law Governing Automobile Accidents" found in the 1962 Wis Law Rev 240, 250, Professor Campbell asserts:

> *b. The "Emergency" Rule.* The loose nature of what we commonly call the "emergency doctrine" was fully presented in this *Law Review* in 1950.[105] The author concluded that we are not really administering a separate doctrine, but that the emergency rule is ". . . only one facet of ordinary care."[106] Cases since 1950 fully support his conclusion. The heart of the rule as stated in the 1960 recommended jury instructions is as follows:
>
> > ". . . .[Drivers] are not guilty of negligence if they make such choice of action or inaction as an ordinarily prudent person might make, if placed in the same position, even through it should afterwards appear not to have been the best or safest course. . . ."[107]
>
> It will be noticed that this is exactly the way all negligence is tested. The standard of the reasonably prudent man is the guide. The issue is determined by the situation at the time of action; not by the armchair deductions of the Monday morning quarterback.

The withdrawn instruction proposed to elevate the standard of care under "circumstances naturally calculated to affect or increase the hazard of collision or injury." In the second paragraph, the instruction minimized the care required, stating "under other circumstances, a slight degree of caution may be ordinary care." These standards deviated from the general standard of care found in JI-1005 in which a jury measures negligence by "the care a reasonable person would use under similar circumstances."

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1021 NEGLIGENCE OF MENTALLY DISABLED

Evidence has been received (it appears without dispute) that the defendant at the time of (collision, accident, fire, or other alleged tort) was mentally disabled. A person who is mentally disabled is held to the same standard of care as one who has normal mentality, and in your determination of the question of negligence, you will give no consideration to the defendant's mental condition.

COMMENT

This instruction and comment were originally published in 1971. The comment was revised in 1994, 1996, 1998, 1999, 2000, 2003, 2004, and 2005.

Hofflander v. St. Catherine's Hospital, Inc., 2003 WI 77, 262 Wis.2d 539, 664 N.W.2d 545; Jankee v. Clark County, 2000 WI 64, 235 Wis.2d 700, 612 N.W.2d 297; Gould v. American Family Mut. Ins. Co., 198 Wis.2d 450, 543 N.W.2d 282 (1996); Burch v. American Family Mut. Ins. Co., 198 Wis.2d 465, 543 N.W.2d 277 (1996); Breunig v. American Family Ins. Co., 45 Wis.2d 536, 542, 173 N.W.2d 619 (1970); Guardianship of Meyer, 218 Wis. 381, 261 N.W. 211 (1935); Restatement, Second, Torts § 283B and appendix (1966); 57 Am. Jur.2d Negligence § 82 (1971); 1955 Wis. L. Rev. 12; Prosser, Law of Torts (4th) § 135 at 1000 (1971).

This instruction holds mentally disabled defendants to the reasonable person standard of care.

In Jankee, the court noted that the policy rationales for the rule embodied in this instruction trace their origins to the 1930s, when the court observed that imposing liability on the mentally disabled: (1) better apportions loss between two innocent persons to the one who caused the loss, (2) encourages restraint of the disabled, and (3) prevents tortfeasors from feigning incapacity to avoid liability. The court went on to recognize "more contemporary justifications" for the general rule. It said the reasonable person standard of care obligates mentally disabled persons to conform their behavior to the expectations of the communities in which they live. The court also recognized a more practical rationale. It said the reasonable person standard of care allows courts and juries to bypass the imprecise task of distinguishing among variations in character, emotional equilibrium, and intellect. Jankee, supra, at 734.

The supreme court has fashioned limited defenses for mentally disabled individuals on two occasions. In Breunig, the court said a defendant cannot be found negligent when he or she is suddenly overcome without forewarning by a mental disability or disorder that makes it impossible for the defendant to appreciate the duty to exercise ordinary care. A second exception to liability was created in Gould for persons in institutionalized settings who do not have the capacity to control or appreciate their conduct when

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they cause injury to caretakers employed for financial compensation. The court said that the expansion of the narrow Gould exception to other circumstances based on a party's capacity to control or appreciate conduct would eviscerate the common law rule. Jankee, supra, at 738.

Mentally Disabled Person Under Custody and Control: Contributory Negligence. See Wis. JI-Civil 1385.5.

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1021.2 ILLNESS WITHOUT FOREWARNING

(Defendant) has denied that (he) (she) was negligent in the operation of the automobile on the ground that, without prior warning, (he) (she) was subjected to an illness that affected (his) (her) ability (to understand and appreciate the duty to exercise ordinary care in driving the car) (to control the car in an ordinarily prudent manner).

The law of Wisconsin is that where a driver, through sudden illness or loss of consciousness, commits an act or omits a precaution which would otherwise constitute negligence, such act or omission is not negligence if the occurrence of such illness or loss of consciousness was not preceded by sufficient warning that a person of ordinary intelligence and prudence ought reasonably to foresee that he or she, by driving a car would, subject the person or property of another or of himself or herself to an unreasonable risk of injury or damage.

However, when the occurrence of the illness or loss of consciousness should have been reasonably foreseen, then the person so disabled may be found negligent. The negligence is not in the manner of driving but rather in driving at all, if the person should reasonably have foreseen that the illness or lack of consciousness might occur and affect the person's manner of driving.

COMMENT

The instruction and comment were approved by the Committee in 1971. The comment was reviewed without change in 1980 and 1989. The comment was updated in 2001.

Breunig v. American Family Ins. Co., 45 Wis.2d 536, 173 N.W.2d 619 (1970).

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The party asserting the defense of illness without forewarning has the burden of proof to establish it. 28 A.L.R.2d 16, 38 (1953). See Lambrecht v. Estate of Kaczmarczyk, 2001 WI 25, 241 Wis.2d 804, 623 N.W.2d 751.

A sleeping driver is negligent as a matter of law. Theisen v. Milwaukee Automobile Mut. Ins. Co., 18 Wis.2d 91, 118 N.W.2d 140 (1962). In Theisen, supra, the court noted that certain illnesses while driving would not be negligence as a matter of law:

> We exclude from this holding those exceptional cases of loss of consciousness resulting from injury inflicted by an outside force or fainting or heart attack, epileptic seizure, or other illness which suddenly incapacitates the driver of an automobile and when the occurrence of such disability is not attended with sufficient warning or should not have been reasonably foreseen. When, however, such occurrence should have been reasonably foreseen, we have held the driver of a motor vehicle negligent as a matter of law, as in the sleep cases. Eleason v. Western Casualty & Surety Co., (1948), 254 Wis. 134, 35 N.W.2d 301 (epilepsy); Wisconsin Natural Gas Co. v. Employers Mut. Liability Ins. Co., supra; Theisen v. Milwaukee Automobile Mut. Ins. Co., supra at 99.

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1022.2 NEGLIGENCE OF GENERAL CONTRACTOR: INCREASING RISK OF INJURY TO EMPLOYEE OF SUBCONTRACTOR

A general contractor who sublets all or a part of a contract to a subcontractor has a duty not to commit an affirmative act which would increase the risk of injury to an employee of the subcontractor.

An affirmative act is an act of commission – that is, something that one does – as opposed to an act of omission, which is something one fails to do.

COMMENT

This instruction was approved in 1973. The comment was updated in 1989, 2010, and 2020. The 2020 revision updated case law citations.

This instruction deals with the "retained-control" exception to the general immunity of one who hires an independent contractor.

Barth v. Downey Co., 71 Wis.2d 775, 239 N.W.2d 92 (1976); Lemacher v. Circle Constr. Co., 72 Wis.2d 245, 240 N.W.2d 179 (1976).

Failure to check the credentials of an independent contractor or make other inquiries is not "active misconduct constituting an affirmative act." Wagner v. Continental Casualty Co., 143 Wis.2d 379, 390, 421 N.W.2d 835 (1988). Negligent hiring does not by itself constitute an affirmative act of negligence upon which the liability of a principal employer can be based. Wagner, supra at 390.

Negligence of General Contractor: Increasing Risk of Injury to Employee of Subcontractor. A general contractor who fails to warn a subcontractor about the dangers of asbestos, fails to investigate or test for the health effects of asbestos, and who fails to instruct a subcontractor on precautionary measures when dealing with asbestos has committed an omission, not an affirmative act of negligence. Tatera v. FMC Corp., 2010 WI 90, ¶29, 328 Wis.2d 320, 786 N.W.2d 810. Additionally, supplying an unsafe asbestos-containing product is not an affirmative act of negligence because the failure to warn of danger is an omission. Id., ¶30.

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1022.4 NEGLIGENCE: BUILDING CONTRACTOR

A building contractor has a duty to exercise ordinary care in the construction or remodeling of a building. This duty requires such contractor to perform work with the same degree of care and skill and to provide such suitable materials as are used and provided by contractors of reasonable prudence, skill, and judgment in similar construction.

COMMENT

The instruction and comment were originally published in 1974. The comment was updated in 1989 and 2016.

A building contractor is liable for injury or damage caused by his or her negligence either to the owner or to third person after completion and acceptance of the work where the defect is concealed or latent in character and is held to the same rules of liability as a manufacturer or vendor. A. E. Inv. Corp. v. Link Builders, Inc., 62 Wis.2d 479, 214 N.W.2d 764 (1974).

An owner is held to a waiver if he or she knowingly accepts a defective performance. Fisher v. Simon, 15 Wis.2d 207, 112 N.W.2d 705 (1961); Restatement, Second, Torts § 385 (1934).

A building contractor may be negligent in using materials which a contractor of reasonable prudence, skill, and judgment would know were defective. Colton v. Foulkes, 259 Wis. 142, 47 N.W.2d 901 (1950); see also 25 A.L.R.3d 403 (1969); 61 A.L.R.3d 792 (1975).

Architects and Engineers. Architects and engineers have an analogous duty. See Barnes v. Lozoff, 20 Wis.2d 644, 650, 123 N.W.2d 543 (1963). A. E. Inv. Corp. v. Link Builders, Inc., supra at 489:

> An architect has the duty of using the standard of care ordinarily exercised by the members of that profession.

Construction by Private Homeowner. The court of appeals has held that alleged negligence by a private homeowner occurring in a private home building project should not be judged by the standard of a commercial builder – vendor. Bagnowski v. Preway Inc., 138 Wis.2d 241, 405 N.W.2d 746 (Ct. App. 1987). A "builder – vendor" is defined as "one in the business of building homes upon land owned by him, and who then sells the houses together with the land to the public." Bagnowski v. Preway, Inc., supra. In Bagnowski, the trial court instructed the jury that the private homeowner who had installed a woodburning stove was responsible only for defects that he knew, or reasonably should have known, existed when he sold his home.

Negligence; Standard of Care. See the comment to Wis JI-Civil 1005.

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1022.6 LIABILITY OF ONE EMPLOYING INDEPENDENT CONTRACTOR

Generally, an (owner) (principal contractor) is not responsible to a third person for the negligence of an independent contractor. However, an (owner) (a principal contractor) must exercise ordinary care to prevent injury to third persons or damage to their property if: [the work to be done is inherently dangerous] [a contract between the (owner) (principal contractor) and the third person requires that the (owner) (principal contractor) will take ordinary care to (prevent injury to the third person) (prevent damage to the property of the third person) (secure the proper performance of the work)].

Ordinary care is that degree of care which you would expect a reasonable person to use under the same or similar circumstances.

[Inherently dangerous work is work from which one can naturally expect harm to arise unless something is done to avoid that harm.]

[Note: Insert appropriate instructions on contract law, if applicable.]

SUGGESTED VERDICT FORMS

FORM 1 (Inherently dangerous activity):

1. Was the work performed by the (owner) (principal contractor) inherently dangerous?

Answer:_____
Yes or No

[Note: There are times when the above question will not be necessary. In Wagner v. Continental Casualty Co., 143 Wis.2d 379, 421 N.W.2d 835 (1988), cited in the comment, the Wisconsin Supreme

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Court said that "A person engaged in an activity . . . that is inherently dangerous without special precautions, can take steps to minimize the risk of injury. Examples include general construction, demolition, and excavation." The case appears to say that those three types of activity are inherently dangerous by their nature. Note also that the Wagner court differentiates between activity that is "inherently dangerous" and activity that is "extrahazardous or abnormally dangerous". Examples of extrahazardous activity" . . . include transporting nuclear waste or working with toxic gases."]

2. If you answered question 1 "yes," then answer this question: Did (owner) fail to use ordinary care in (describe the work done)?

Answer:_____
Yes or No

3. If you answered question 2 "yes," then answer this question: Was that failure to use ordinary care a cause of (injury to (third person)) (damage to (third person)'s property)?

Answer:_____
Yes or No

[Follow with the appropriate damage question.]

FORM 2 (Contract to prevent injury or damage):

1. Did the contract between (third person) and the (owner/principal contractor) require that (he) (she) (it) would use ordinary care to prevent (injury to (third person)) (damage to the property of (third person))?

Answer:_____
Yes or No

2. If you answered question 1 "yes," then answer this question: Did the (owner/principal contractor) fail to use ordinary care to protect the (third person) (or (his) (her) property) from (injury) (harm)?

Answer:_____
Yes or No

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3. If you answered question 2 "yes," then answer this question: Was that failure to use ordinary care a cause of (injury to (third person)) (damage to the property of (third person))?

Answer:_____
Yes or No

[Follow with the appropriate damage question.]

FORM 3 (Contract to secure proper performance):

1. Did the contract between (third person) and (owner/principal contractor) require that (he) (she) (it) would use ordinary care to secure the proper performance of the work?

Answer:_____
Yes or No

[Follow the format of questions in Form 2 for questions 2 and 3 and then follow with the appropriate damage question.]

COMMENT

The instruction was approved by the Committee in 1974 and revised in 1999. Editorial changes were made in 2004. The comment was updated in 1989, 1997, 1999, 2001, 2014, and 2015.

Liability of One Employing an Independent Contractor. The general rule, stated in the first sentence of the instruction, is found in numerous cases. See Brandenburg v. Briarwood Forestry Services, LLC, 2014 WI 37, 354 Wis.2d 413, 847 N.W.2d 395; Wagner v. Continental Casualty Co., 143 Wis.2d 379, 421 N.W.2d 835 (1988); Snider v. Northern States Power Co., 81 Wis.2d 224, 260 N.W.2d 260 (1977); Weber v. Hurley, 13 Wis. 2d 560, 109 N.W.2d 65 (1961). See also 41 Am. Jur.2d Independent Contractors, §§ 32 & 33 (1968).

A contractor qualifies as an independent contractor when the principal (hiring) contractor does not control the details of the hired contractor's work. See Wis JI-Civil 4060.

Inherently Dangerous Exception. The general rule, though long recognized in Wisconsin, has been sidestepped in many cases where the appellate courts have found that the risk of injury or damage (the

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inherently dangerous exception) from the work was so great that the owner or principal contractor should have taken reasonable steps to avoid it. See Brandenburg v. Briarwood Forestry Services, LLC, 2014 WI 37, 354 Wis.2d 413, 847 N.W.2d 395. For example, the court, in Wertheimer v. Saunders, 95 Wis. 573, 70 N.W. 824 (1897), ruled that a landlord owed a duty of reasonable care to protect a tenant's property from damage while having a roof replaced. Also, in Majestic Realty Corp. v. Brant, 198 Wis. 527, 224 N.W. 743 (1929), the court stated there was an exception as to work inherently dangerous to users of the highway. The case involved a fatal injury to a pedestrian caused by falling terra cotta. The terra cotta was dislodged by the swinging platform of a painting contractor coming into contact with the owner's building.

Contract Language. In other cases, the supreme court has found a duty exists because of the contractual relationship between the third party and the owner or principal contractor. See Medley v. Trenton Investment Co., 205 Wis. 30, 236 N.W. 713 (1931), where a landlord was found to have a duty to use reasonable care to protect tenants from injury (a tenant died from fumes leaking into her apartment from another apartment that was being fumigated); also Peterson v. Sinclair Refining Co., 20 Wis. 2d 576, 123 N.W.2d 496 (1963), in which gasoline was delivered to a home instead of the fuel oil contracted for and an explosion followed. The court stated that the contract between the parties included an implied promise of safe delivery which, if breached, gave rise to a tort action. Two other cases, Brooks v. Hayes, 133 Wis.2d 228, 395 N.W.2d 167 (1986), and Jacob v. West Bend Mut. Ins. Co., 203 Wis.2d 524, 553 N.W.2d 800 (1996), involved home constructions where the principal contractors attempted to defend the homeowner's suits for defective workmanship by claiming that the independent subcontractors were the proper defendants. In each case, the appellate court said that the principal contractor had agreed in its contract with the homeowner that it would provide the needed materials and labor to build the home so the principal contractor could not avoid liability by hiding behind its subcontractor.

Duty Under Safe Place Is Not Delegable. In Barry v. Employers Mutual Casualty Co., 2001 WI 101, 245 Wis.2d 560, 630 N.W.2d 517, the plaintiff argued that the owner's duty under the safe place statute was nondelegable, and, therefore, any causal negligence attributed to the independent contractor who installed unsafe loose nosing should be imputed to the owner. The property owner disagreed, pointing out the general rule that one who hires an independent contractor is not liable for the negligence of the independent contractor. The supreme court held that the duties imposed on employers under the safe place statute are nondelegable. It said the plaintiff's safe place statute claim against the property owner is separate and distinct from the owner's claim for contribution against the nosing contractor. The owner must answer to the plaintiff "for any violation of that duty regardless of whether another party contributed to the violation." The court concluded by saying: that [the property owner] may have contribution rights against [the contractor] to the extent of [the contractor]'s negligence does not diminish the nature of [the owner's] statutory duty.

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1023 MEDICAL NEGLIGENCE

In (treating) (diagnosing) (plaintiff)'s (injuries) (condition), (doctor) was required to use the degree of care, skill, and judgment which reasonable (doctors who are in general practice) (specialists who practice the specialty which (doctor) practices) would exercise in the same or similar circumstances, having due regard for the state of medical science at the time (plaintiff) was (treated) (diagnosed). A doctor who fails to conform to this standard is negligent. The burden is on (plaintiff) to prove that (doctor) was negligent.

A doctor is not negligent, however, for failing to use the highest degree of care, skill and judgment or solely because a bad result may have followed (his) (her) (care and treatment) (surgical procedure) (diagnosis). The standard you must apply in determining if (doctor) was negligent is whether (doctor) failed to use the degree of care, skill, and judgment which reasonable (general practitioners) (specialists) would exercise given the state of medical knowledge at the time of the (treatment) (diagnosis) in issue.

[Use this paragraph only if there is evidence of two or more alternative methods of treatment or diagnosis recognized as reasonable: If you find from the evidence that more than one method of (treatment for) (diagnosing) (plaintiff)'s (injuries) (condition) was recognized as reasonable given the state of medical knowledge at that time, then (doctor) was at liberty to select any of the recognized methods. (Doctor) was not negligent because (he) (she) chose to use one of these recognized (treatment) (diagnostic) methods rather than another recognized method if (he) (she) used reasonable care, skill, and judgment in administering the method.]

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You have heard testimony during this trial from doctors who have testified as expert witnesses. The reason for this is because the degree of care, skill, and judgment which a reasonable doctor would exercise is not a matter within the common knowledge of laypersons. This standard is within the special knowledge of experts in the field of medicine and can only be established by the testimony of experts. You, therefore, may not speculate or guess what the standard of care, skill and judgment is in deciding this case but rather must attempt to determine it from the expert testimony that you heard during this trial. In determining the weight to be given an opinion, you should consider the qualifications and credibility of the expert and whether reasons for the opinion are based on facts in the case. You are not bound by any expert's opinion.

(Insert the appropriate cause instruction. To avoid duplication, JI-1500 should not be given if the following two bracketed paragraphs are used.)

[The cause question asks whether there was a causal connection between negligence on the part of (doctor) and (plaintiff)'s (injury) (condition). A person's negligence is a cause of a plaintiff's (injury) (condition) if the negligence was a substantial factor in producing the present condition of the plaintiff's health. This question does not ask about "the cause" but rather "a cause." The reason for this is that there can be more than one cause of (an injury) (a condition). The negligence of one (or more) person(s) can cause (an injury) (a condition) or (an injury) (a condition) can be the result of the natural progression of (the injury) (the condition). In addition, the (injury) (condition) can be caused jointly by a person's negligence and also the natural progression of the (injury) (condition).]

[If you conclude from the evidence that the present condition of (plaintiff)'s health was caused jointly by (doctor)'s negligence and also the natural progression of (plaintiff)'s

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(injury) (condition), then you should find that the (doctor)'s negligence was a cause of the (plaintiff)'s present condition of health.]

[The evidence indicates without dispute that when (plaintiff) retained the services of (doctor) and placed (himself) (herself) under (doctor)'s care, (plaintiff) was suffering from some (disability resulting from injuries sustained in an accident) (illness or disease). (Plaintiff)'s then physical condition cannot be regarded by you in any way as having been caused or contributed to by any negligence on the part of (doctor). This question asks you to determine whether the condition of (plaintiff)'s health, as it was when (plaintiff) placed (himself) (herself) under the doctor's care, has been aggravated or further impaired as a natural result of the negligence of (doctor)'s (treatment) (diagnosis).]

(Insert appropriate damage instructions.)

[(Plaintiff) sustained injuries before the (treatment) (diagnosis) by (doctor). Such injuries have caused (and could in the future cause) (plaintiff) to endure pain and suffering and incur some disability. In answering these questions on damages, you will entirely exclude from your consideration all damages which resulted from the original injury; you will consider only the damages (plaintiff) sustained as a result of the (treatment) (diagnosis) of by (doctor).]

[It will, therefore, be necessary for you to distinguish and separate, first, the natural results in damages that flow from (plaintiff)'s original (illness) (injuries) and, second, those that flow from (doctor)'s (treatment) (diagnosis) and allow (plaintiff) only the damages that naturally resulted from the (treatment) (diagnosis) by (doctor).]

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COMMENT

This instruction was approved by the Committee in 1963. It was revised in 1966, 1974, 1984, 1987, 1988, 1989, 1990, 1991, 1992, 1995, 1996, 1998, 2002, 2009, 2011, and 2012. The comment was updated in 1990, 1992, 1996, 2001, 2002, 2003, 2004, 2005, 2006, 2011, 2012, 2016, 2017 and 2019. The instruction was revised in 2009 to add "(diagnosis)" throughout the instruction to the alleged negligence.

The Committee recommends that the basic inquiry with respect to the defendant's conduct be framed in simple terms of negligence. Failure on the part of the doctor to conform to the applicable standard of care constitutes negligence. This form of submission is preferable to the form previously employed, i.e., stating the duty in the question. The statement of the duty is the function of the instruction. The Committee recommends that the general negligence instruction, JI-Civil 1005, not be used in addition to this instruction.

There are a series of concepts involved in the instruction. The duty of the doctor in his or her care, treatment, and procedures; the effects of bad results on liability; the degree of care, skill, and judgment required to satisfy his or her duty; the duty allows a choice of accepted alternative methods of treatment; the doctor's liability cannot be predicated on other than expert testimony (except in a res ipsa case); and the issue is not on the judgment the doctor made but on the degree and skill he or she exercised in arriving at the judgment. The Committee concluded that foreseeability of injury or harm is inherent in the standard expressed in the first paragraph, and if an issue in the case, it must be addressed by expert testimony.

If the trial judge prefers, this instruction can be divided into its components (i.e., negligence, cause, alternative care, damages, etc.) when instructing the jury and when providing the jury with written instructions during its deliberations.

Standard of Care. This instruction reflects the changes recommended by the Wisconsin Supreme Court in Nowatske v. Osterloh, 198 Wis.2d 419, 543 N.W.2d 25 (1996). The former version of this instruction was based on prevailing case law which measured ordinary care based on what an "average" physician would have done. The court in Nowatske said "the standard of care applicable to physicians in Wisconsin can not be conclusively established either by a reflection of what the majority of practitioners do or by a sum of the customs which those practitioners follow." Instead, the court said "it must be established by a determination of what it is reasonable to expect of a professional given the state of medical knowledge at the time of the treatment." Nowatske, supra, at 438-39. See also the comment to Wis JI-Civil 1005.

Standard of Care: Unlicensed First-Year Resident. The Wisconsin Supreme Court in Phelps v. Physicians Ins. Co., 2005 WI 85, 282 Wis.2d 69, 698 N.W.2d 643, has held that unlicensed first-year residents should be held to:

> the standard of care applicable to an unlicensed first-year resident . . .Although we anticipate this new standard of care to be lower than that of an average licensed physician in some cases, we do not expect that it will become a grant of immunity. After all, unlicensed first-year residents are graduates of a medical school who provide sophisticated health care services appropriate to their "in training" status. Therefore, unlicensed residents could still be found negligent if, for example, they undertook to treat outside the scope of their authority and expertise, or they failed to consult with someone more skilled and experienced when the standard of care required it.

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The court characterized the status of an unlicensed first-year resident as "unique." It said the resident's authority was limited:

> Although [resident] could refer to himself as an "M.D.," his freedom of action was more restricted than that of a licensed physician. Indeed, the circuit court found that Dr. Lindemann "had no authority or privileges to provide primary obstetrical care," and "was not supposed to act as the primary attending physician." Rather, "[h]is primary duty was to assess and report findings and differential diagnoses to an upper level senior resident or to the attending obstetrician."

Effect of Bad Results. The second paragraph states the rule as to the effects of bad results on the doctor's liability. Bad results raise no presumption of negligence. DeBruine v. Voskuil, 168 Wis. 104, 169 N.W. 288 (1918); Ewing v. Goode, 78 F. 442 (S.D. Ohio 1897); Wurdemann v. Barnes, 92 Wis. 206, 66 N.W. 111 (1896); Francois v. Mokrohisky, supra; Finke v. Hess, 170 Wis. 149, 174 N.W. 466 (1920); Hoven v. Kelble, 79 Wis.2d 444, 256 N.W.2d 379 (1976). See also Nowatske v. Osterloh, supra.

The judgment of a doctor in his or her care, treatment, and procedures, whether good, bad, honest or mistaken, is not at issue on his or her liability. The issue raised is whether in making the judgment, he or she exercised that degree of care and skill imposed on him or her. If he or she failed to meet that standard, he or she was negligent and liable. Christianson v. Downs, supra; Hoven v. Kelble, supra; Carson v. Beloit, 32 Wis.2d 282, 145 N.W.2d 112 (1966); Wurdemann v. Barnes, supra; Jaeger v. Stratton, 170 Wis. 579, 176 N.W. 61 (1920).

"Not omniscience, but due care, diligence, judgment, and skill are required of physicians. When they meet such test, they are not liable for results or errors in judgment." Jaeger v. Stratton, supra.

"The question . . . is not whether a physician has made a mistake; rather, the question is whether he was negligent." Francois v. Mokrohisky, supra.

"The law . . . recognizes the medical profession for what it is: a class of fallible men, some of whom are unusually well qualified and expert, and some of whom are not. The standard to which they must conform is determined by the practices of neither the very best nor the worst of the class." Francois v. Mokrohisky, supra.

In 1988, the court in Schuster v. Altenberg, supra, reaffirmed the concept that liability will not be imposed under this negligence standard for mere errors in judgment. It quoted from its earlier holdings:

> The law governing this case is well settled. A doctor is not an insurer or guarantor of the correctness of his diagnosis; the requirement is that he use proper care and skill. Knief v. Sargent, 40 Wis.2d 4, 8, 161 N.W.2d 232 (1968). The question is not whether the physician made a mistake in diagnosis, but rather whether he failed to conform to the accepted standard of care. Francois v. Mokrohisky, 67 Wis.2d 196, 201, 226 N.W.2d 470 (1975). Christianson v. Downs, 90 Wis.2d 332, 338, 279 N.W.2d 918 (1979).

The second paragraph also deals with the extent and quality of the doctor's treatment required to satisfy his or her duty. A doctor is not required to exercise the highest degree of care, skill, and judgment. Hrubes v. Faber, 163 Wis. 89, 157 N.W. 519 (1916); DeBruine v. Voskuil, supra; Jaeger v. Stratton, supra; Trogun v. Fruchtman, supra; Christianson v. Downs, supra; Carson v. Beloit, supra; Francois v. Mokrohisky, supra; Hoven v. Kelble, supra.

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Alternative Methods. The bracketed language at the bottom of page one can be used in cases when there is evidence that more than one method of treatment or diagnosis is recognized as reasonable. See Nowatske v. Osterloh, supra, at 448. The reasonable pursuit of an accepted alternative method does not establish a doctor's liability, even if experts disagree on the method used. A physician is required by statute to inform a patient about the availability of all alternate, viable medical treatments and the benefits and risks of these treatments, Wis. Stat. § 448.30. For claims based on a failure by a physician to adequately inform a patient, see Wis JI-Civil 1023.2 Malpractice: Informed Consent.

Unnecessary and improper treatment constitutes medical malpractice. Northwest Gen. Hosp. v. Yee, 115 Wis.2d 59, 61-62, 339 N.W.2d 583 (1983).

Expert Testimony. Expert testimony is needed to support a finding of negligence on the part of the doctor. Kuehnemann v. Boyd, 193 Wis. 588, 214 N.W. 326 (1927); Holton v. Burton, supra; Lindloff v. Ross, 208 Wis. 482, 243 N.W. 403 (1932); Ahola v. Sincock, 6 Wis.2d 332, 94 N.W.2d 566 (1959); Froh v. Milwaukee Medical Clinic, S.C., 85 Wis.2d 308, 270 N.W.2d 83 (Ct. App. 1978); McManus v. Donlin, 23 Wis.2d 289, 127 N.W.2d 22 (1964); Treptau v. Behrens Spa, Inc., supra.

The degree of care and skill (of a physician) can only be proved by the testimony of experts. Without such testimony, the jury has no standard which enables it to determine whether the defendant failed to exercise the degree of care and skill required of him or her. Kuehnemann v. Boyd, supra; Holton v. Burton, supra; Lindloff v. Ross, supra. In 2011, the Committee added language which instructs the jury that in determining the weight of an expert's testimony, it should consider the qualifications and credibility of the expert and whether the reasons for the opinion are based on facts in the case. The jury is further instructed that it is not bound by any expert's opinion. See Weborg v. Jenny, 2012 WI 67 (Paragraph 73), 341 Wis.2d 668, 816 N.W.2d 191.

For a discussion of the admissibility of expert evidence in a medical negligence case, see Seifert v. Balink, 2017 WI 2, 372 Wis.2d 525, 888 N.W.2d 816.

The general instruction on expert testimony, Wis JI-Civil 260, should be used for issues in the trial other than standard of care.

Causation. The court in Young v. Professionals Ins. Co., 154 Wis.2d 742, 454 N.W.2d 24 (Ct. App. 1990), was critical of an earlier version of JI-1023 relating to cause. The present instruction concerning situations when there is evidence of both negligence and a condition of health resulting from the natural progression of a disease (injury) correctly states that a doctor's negligence may be causal, notwithstanding, that the plaintiff's present condition of health may in part be the result of the natural progression of plaintiff's disease (injury). This is because Wisconsin has long adopted the "substantial factor test" in deciding causation questions and no longer requires that the negligence be the sole or proximate cause. Matuschka v. Murphy, 173 Wis. 484, 180 N.W. 821 (1921), has been overruled because it is "likely to misstate the law of causation." See Young, supra at 749.

This instruction comports with the supreme court's decision in Fischer v. Ganju, 168 Wis.2d 834, 485 N.W.2d 10 (1992). In Fischer, the supreme court stated that a paragraph from a prior version JI-1023 (1989) was "less than completely accurate." The version given by the trial judge in Fischer in January 1990 was based on the 1989 version of this instruction which was published in April of 1989. This version was revised by the committee following the decision in Young v. Professionals Ins. Co., supra. The revised JI-1023 was published in May of 1991 as part of the 1991 supplement. This revision (1991) changed the language of the prior version dealing with causation. It has not been revised since the 1991 supplement. The Committee has closely compared this present version of JI-1023 to the court's criticism of the 1989 version of the instruction. The Committee concludes that the causation language of the present instruction

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is consistent with the discussion of causation in the Fischer decision and accurately states the law of causation in medical malpractice pre-existing condition cases.

Specialists. See Johnson v. Agoncillo, 183 Wis.2d 143, 515 N.W.2d 508 (Ct. App. 1994), where the First District Court of Appeals held that under current Wisconsin law, a doctor who practices one medical specialty is not held to the standard of care of another medical specialty, even when treating a patient in that latter specialty. Dr. Agoncillo was a family practitioner treating a high-risk obstetrical patient. Plaintiff Johnson requested an instruction that would hold Agoncillo to the standard of the "average physician who treats high risk obstetrical patients. . . ." The trial judge refused to give such an instruction and the court of appeals affirmed, stating:

> Thus, that Dr. Agoncillo chose to care for and treat Ms. Johnson during her high-risk pregnancy did not transform his class of physician to that of those who treat high-risk obstetrical patients; he was and he remained a general family practitioner who treated obstetrical patients and, as instructed by the trial court, he was thus 'required to use the degree of care, skill, and judgment which is usually exercised in the same or similar circumstances' by the average physician in that class.

The court went on to say, however, that the physician who attempts to treat a patient outside her or his expertise is not, thereby, immunized from liability. Referring to a cardiologist who treats a cancer patient, the court said in Johnson at 152:

> If competent evidence establishes that the average cardiologist would either refer the cancer patient to an oncologist or would consult with an oncologist, the cardiologist could be found negligent for not referring or consulting.

Captain of Ship Doctrine. In a recent decision, the plaintiff in a medical malpractice action argued that the surgeon should be held vicariously liable for the negligence of two hospital nurses from a county-owned hospital who were responsible for counting sponges. Lewis v. Physicians Ins. Co., 2001 WI 60, 243 Wis.2d 648, 627 N.W.2d 484. The hospital was county-owned and, therefore, its liability at the time was limited to $50,000.

The trial court, on summary judgment, agreed with the plaintiff's argument that, as a matter of law, the surgeon is the "captain of the ship" and is responsible for the actions of the parties that were in the operating room. Interestingly, the plaintiff did not argue that the surgeon was vicariously liable for the nurses' actions under the doctrine of respondeat superior. Both the court of appeals and supreme court rejected the adoption of the captain of the ship doctrine to impose liability on the doctor. The supreme court said the "captain of the ship doctrine" has lost its vitality across the country as plaintiffs have been able to sustain actions against full-care modern hospitals for the negligence of their employees.

Psychiatric Malpractice Claims. The Wisconsin Supreme Court recognized in Schuster v. Altenberg, supra, that a psychiatrist may be negligent by:

1. negligent diagnosing and treating, including failing to warn of side effects of medication,
2. failing to warn a patient's family of the patient's condition and its dangerous implications,
3. failing to seek the commitment of the patient.

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Warning a patient of risks associated with a condition and the patient as to appropriate conduct constitutes treatment as to which a physician must use ordinary care. Schuster v. Altenberg, supra. A psychiatrist may be held liable to third parties for failing to warn of the side effects of medication if the side effects were such that a patient should have been cautioned against driving, because it was foreseeable that an accident could result causing harm to the patient or third parties.

A psychotherapist has the duty to warn third parties or to institute proceeding for the detention or commitment of a dangerous individual for the protection of the patient or the public.

Dental Malpractice. For dental malpractice, see Wis JI-Civil 1023.14.

Determination of Future Economic Damages. In a claim based on injury from any treatment or operation performed by, or from any omission by, a person who is a health care provider, the determination of future economic damages must reflect present value, life expectancy, and the effects of inflation. Specifically, Wis. Stat. § 893.55(4)(e) states:

> (e) Economic damages recovered under ch 655 for bodily injury or death, including any action or proceeding based on contribution or indemnification, shall be determined for the period during which the damages are expected to accrue, taking into account the estimated life expectancy of the person, then reduced to present value, taking into account the effects of inflation.

The Committee interprets this subsection as requiring the jury to make a reduction based on the time value of money and to consider inflation in determining future economic damages. The Committee believes that the statutory language quoted above does not mean that the trial judge should make allowance for present value of money or inflation immediately after the jury has determined economic damages or on motions after verdict.

Medical Negligence Damage Caps. In Ferdon v. Wisc. Patients Compensation Fund, 2005 WI 125, 284 Wis.2d 573, 701 N.W.2d 440, the court held that the $350,000 cap (adjusted for inflation) on noneconomic medical malpractice damages set forth in Wis. Stat. §§ 655.017 and 893.55(4) violates the equal protection guarantees of the Wisconsin Constitution. Previously, the court had held there is a single cap on noneconomic damages recoverable from health care providers for medical malpractice. Maurin v. Hall, 2004 WI 100, 274 Wis.2d 28, 682 N.W.2d 866. The amount of the cap is determined by whether the patient survives the malpractice or whether the patient dies. When the patient survives, the cap is contained in Wis. Stat. § 893.55(4)(d). When the patient dies, the cap is contained in Wis. Stat. § 895.04(4). In cases where medical malpractice leads to death, the wrongful death cap applies in lieu of - - not in addition to - - the medical malpractice cap. Following Ferdon, the legislature acted to impose a $750,000 cap on noneconomic damages set forth ins Wis. Stat. § 893.55(1d)(b).

The court in Ferdon also created an intermediate level of constitutional review that it called "rational basis with teeth, or meaningful rational basis." However, in Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 2018 WI 78, 383 Wis.2d 1, 914 N.W.2d 678, the court overruled Ferdon for erroneously invading the province of the legislature and found that rational basis with teeth has no standards for application and created uncertainty under the law. Instead, the court held that rational basis review is appropriate because the cap on noneconomic damages does not deny any fundamental right or implicate any suspect class. When the five-step rational basis scrutiny provided in Aicher v. Wis. Patients Comp. Fund, 2000 WI 98, 237 Wis.2d 99, 613 N.W.2d 849 was applied, the court concluded that "the legislature's comprehensive plan that guarantees payment while controlling liability for medical

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malpractice through the use of insurance, contributions to the Fund and a cap on noneconomic damages has a rational basis." Therefore, the $750,000 cap on noneconomic damages in medical malpractice actions is not facially unconstitutional." See Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 2018 WI 78, 383 Wis.2d 1, 31, 914 N.W.2d 678.

Bystander Recovery Claims for Negligent Infliction of Emotional Distress Based on Misdiagnosis. See the committee commentary to Wis. JI-Civil 1510 and 1511.

Answering Special Verdict Questions; Possibility of Inconsistent Verdicts. In medical negligence cases, allowing the jury to award damages regardless of how it answered negligence and cause verdict questions can lead to inconsistent verdicts under Runjo v. St. Paul Fire Marine Ins. Co., 197 Wis.2d 594, 541 N.W.2d 173 (Ct. App. 1995); LaCombe v. Aurora Medical Group, Inc., 2004 WI App 119, 274 Wis.2d 771, 683 N.W.2d 532; Hegarty v. Beauchaine, 2006 WI App 248, 297 Wis.2d 70, 727 N.W.2d 857. In Runjo, the jury was instructed to answer the damage questions only if it affirmatively answered the negligence and cause questions.

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1023.1 PROFESSIONAL NEGLIGENCE: MEDICAL: DUTY OF PHYSICIAN TO INFORM A PATIENT: SPECIAL VERDICT; WIS. STAT. § 448.30 (2013)

Questions 1 and 2 of the special verdict form relate to the duty to inform a patient and read as follows:

QUESTION 1: On (date), was (doctor) negligent in informing (patient) about the availability of reasonable alternate medical modes of treatment and about the risks and benefits of these alternate treatments?

Answer: _____
Yes or No

QUESTION 2: If you have answered question 1 "yes," then answer this question: Was the negligence of (doctor) in informing (patient) a cause of injury (death) to (patient)?

Answer: _____
Yes or No

COMMENT

This special verdict was approved in 2000 and revised in 2014. The commentary was updated in 2005, 2011, 2012, and 2014. This special verdict applies to a physician required to inform a patient about modes of treatment on or after December 15, 2013. For the special verdict in a trial involving the failure to obtain informed consent prior to December 15, 2013, see the former version of Wis JI-Civil 1023.1 reprinted at the end of this commentary.

After the Wisconsin Supreme Court decision affirming the Court of Appeals in Jandre v. Wisconsin Injured Patients and Families Compensation Fund, 2012 WI 39, 340 Wis.2d 31, 813 N.W.2d 627, the Wisconsin Legislature passed 2013 Wisconsin Act 111 to modify the informed consent law, Wis. Stats. § 448.30. The legislation changed the standard for evaluating whether a doctor properly informed a patient of the patient's treatment options from a "reasonable patient" to "reasonable physician standard."

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In Jandre, the emergency medicine physician was not found negligent in arriving at her diagnosis of Bell's palsy by the jury. However, she was found negligent for not telling the patient that a carotid ultrasound could have been done. The jury found a reasonable patient would want to know about this test, which it was contended would have shown blockage. The jury also found that non-disclosure was a cause of damages sustained by the patient. The plaintiff contended that treatment of the blockage could have avoided the stroke suffered 10 days later. The verdict was for approximately two million dollars.

Under the existing law applied in Jandre, Wisconsin used a "reasonable patient" standard to determine whether a doctor was negligent in giving information. Under that standard, a jury is asked to determine what a reasonable person in the patient's position would want to know to make an informed decision.

The new act (2013 Wis. Act 111) requires doctors to disclose "only information that a reasonable physician in the same or a similar medical specialty would know and disclose under the circumstances." There is no liability for failure to inform patients about "any condition the physician has not included in his or her diagnosis at the time the physician informs the patient."

Damages. For instructions on damages based on informed consent, see Wis JI-Civil 1741, Personal Injuries: Medical Care: Lack of Informed Consent, and Wis JI-Civil 1742, Personal Injuries: Medical Care: Offsetting Benefit from Operation Against Damages from Lack of Informed Consent.

Trials Based on Alleged Failure to Obtain Informed Consent Prior to December 15, 2013. The version of this special verdict prior to the enactment of 2013 Wisconsin Act 111 read:

1023.1 PROFESSIONAL NEGLIGENCE: MEDICAL: INFORMED CONSENT: SPECIAL VERDICT

Questions 1, 2, and 3 of the special verdict form relate to the issue of informed consent and read as follows:

QUESTION 1: Did (doctor) fail to disclose information about the (insert treatment or procedure) necessary for (patient) to make an informed decision?

Answer: _____
Yes or No

QUESTION 2: If you answered question 1 "yes," then answer this question:
If a reasonable person, placed in (patient)'s position, had been provided necessary information about the (insert treatment or procedure), would that person have (refused) (accepted) the (insert treatment or procedure)?

Answer: _____
Yes or No

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QUESTION 3: If you have answered both questions 1 and 2 "yes," then answer this question: Was the failure by (doctor) to disclose necessary information about (insert treatment or procedure) a cause of injury to (patient)?

Answer: _____
Yes or No

# # #

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1023.2 PROFESSIONAL NEGLIGENCE: MEDICAL: DUTY OF PHYSICIAN TO INFORM A PATIENT; Wis. Stat. § 448.30 (2013)

Question _____ asks: On (date), was Dr. _____ negligent in informing (patient) about the availability of reasonable alternate medical modes of treatment and about the risks and benefits of these alternate treatments? A doctor has the duty to inform (his) (her) patient about reasonable alternate medical modes of treatment available to the patient and about the risks and benefits of the treatments that a reasonable physician in the same or a similar medical specialty would know and disclose under the circumstances. If a physician fails to perform this duty to inform, (he) (she) is negligent in informing (his) (her) patient.

A physician's duty to inform (his) (her) patient does not require disclosure of (include as applicable):

- Detailed technical information that in all probability a patient would not understand.
- Risks apparent or known to the patient.
- Extremely remote possibilities that might falsely or detrimentally alarm the patient.
- Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment.
- Information in cases where the patient is incapable of consenting.
- Information about alternate medical modes of treatment for any condition the physician has not included in his or her diagnosis at the time the physician informs the patient.

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You have heard testimony during this trial from doctors who have testified as expert witnesses. This is because information about the availability of reasonable alternate medical modes of treatment and about the risks and benefits of the treatments that a reasonable physician would disclose to a patient in the circumstances of this case is not a matter within the common knowledge of lay persons. The reasonable physician's standard of informing a patient is within the special knowledge of experts in the field of medicine and can only be established by the testimony of experts. You may not speculate or guess what the standard of informing a patient is in deciding this case but rather must attempt to determine it from the expert testimony that you have heard during this trial. In determining the weight to be given an opinion, you should consider the qualifications and credibility of the expert and whether reasons for the opinion are based on facts in the case. You are not bound by any expert's opinion.

COMMENT

This instruction and commentary were approved in 2014. See Comment to Wis JI-Civil 1023.1.

This instruction applies to a physician required to inform a patient about modes of treatment on or after December 15, 2013. For informed consent cases based on the failure to properly inform a patient prior to the effective date of Wis. Stat. § 448.30 (2013 Wisconsin Act 111), the following instruction applies:

1023.2 PROFESSIONAL NEGLIGENCE: MEDICAL: INFORMED CONSENT

Question _____ asks:

Did (doctor) fail to disclose information about the (insert treatment or procedure) necessary for (patient) to make an informed decision?

A doctor has the duty to provide (his) (her) patient with information necessary to enable the patient to make an informed decision about a (diagnostic) (treatment) (procedure) and alternative choices of (diagnostic) (treatments) (procedures). If the doctor fails to perform this duty, (he) (she) is negligent.

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To meet this duty to inform (his) (her) patient, the doctor must provide (his) (her) patient with the information a reasonable person in the patient's position would regard as significant when deciding to accept or reject (a) (the) medical (diagnostic) (treatment) (procedure). In answering this question, you should determine what a reasonable person in the patient's position would want to know in consenting to or rejecting a medical (diagnostic) (treatment) (procedure).

The doctor must inform the patient whether (a) (the) (diagnostic) (treatment) (procedure) is ordinarily performed in the circumstances confronting the patient, whether alternate (treatments) (procedures) approved by the medical profession are available, what the outlook is for success or failure of each alternate (treatment) (procedure), and the benefits and risks inherent in each alternate (treatment) (procedure).

However, the physician's duty to inform does not require disclosure of:

[• Information beyond what a reasonably, well-qualified physician in a similar medical classification would know;]

[• Detailed technical information that in all probability the patient would not understand;]

[• Risks apparent or known to the patient;]

[• Extremely remote possibilities that might falsely or detrimentally alarm the patient;]

[• Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment;]

[• Information in cases where the patient is incapable of consenting.]

[If (doctor) offers to you an explanation as to why (he) (she) did not provide information to (plaintiff), and if this explanation satisfies you that a reasonable person in (plaintiff)'s position would not have wanted to know that information, then (doctor) was not negligent.]

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1023.3 PROFESSIONAL NEGLIGENCE: MEDICAL: DUTY OF PHYSICIAN TO INFORM A PATIENT: CAUSE

Question _____ asks: Was (physician)'s negligence in informing (plaintiff) a cause of (injury) (death) to (plaintiff)? A physician's negligence is a cause of a patient's (injury) (death) if the negligence was a substantial factor in producing the patient's (injury) (death). This question does not ask about "the cause" but rather "a cause." The reason for this is that there can be more than one cause of (an injury) (a death).

COMMENT

This instruction and comment were approved in 2000 and revised in 2015.

If this instruction is used, then Wis JI-Civil 1500 does not have to be given. If issues such as preexisting conditions or national progression of a condition are involved, see Wis JI-Civil 1023.

Effective Date. This instruction applies to a physician required to inform a patient about modes of treatment on or after December 15, 2013. For informed consent cases based on the failure to properly inform a patient prior to the effective date of Wis. Stat. § 448.30 (2013 Wisconsin Act 111), the following instruction applies:

1023.3 PROFESSIONAL NEGLIGENCE: MEDICAL: INFORMED CONSENT: CAUSE

Question _____ is a cause question. A physician's failure to disclose necessary information is a cause of a plaintiff's injury if the failure to inform was a substantial factor in producing the present condition of the plaintiff's health. This question does not ask about "the cause" but rather "a cause." The reason for this is that there can be more than one cause of an injury.

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1023.4 PROFESSIONAL NEGLIGENCE: MEDICAL: DUTY OF PHYSICIAN TO INFORM A PATIENT: CONTRIBUTORY NEGLIGENCE

NO INSTRUCTION IS RECOMMENDED.

COMMENT

This commentary was approved in 2000, and reviewed in 2014. The title was updated, but no instruction is recommended. A previous instruction, numbered JI-Civil 1023.4 and titled, "Cause: Medical Malpractice: Negligent Diagnosis or Omitted Treatment," was withdrawn in 1992.

In Brown v. Dibbell, 227 Wis.2d 28, 595 N.W.2d 358 (1999), the supreme court said that the informed consent statute recognizes that a patient is not in a position to know treatment options and risks and, if unaided, is unable to make an informed decision. The court concluded that "as a general rule a jury should not be instructed that a patient can be found contributorily negligent for failing to ask questions or for failing to undertake independent research."

However, the court said that it did not mean to say "a patient may never be contributorily negligent for failing to seek information." It held that it would require a "very extraordinary fact situation" to render a patient negligent when the patient accepts and trusts the information a doctor provides.

The court, in Brown v. Dibbell, expressly said its decision did not address whether a patient's duty to use ordinary care requires the patient to volunteer information or to spontaneously advise the doctor of material, personal, family, or medical histories that the patient reasonably knows should be disclosed. 227 Wis.2d at 49 n. 13.

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1023.5 PROFESSIONAL NEGLIGENCE: LEGAL—STATUS OF LAWYER AS A SPECIALIST IS NOT IN DISPUTE

In providing legal services to a client, it is a lawyer's duty to use the degree of care, skill, and judgment which reasonably prudent lawyers practicing in this state would exercise under like or similar circumstances. A failure to conform to this standard is negligence. The burden is on (plaintiff) to prove that (lawyer) was negligent.

You are to determine whether (lawyer) was negligent in representing (plaintiff) in light of the facts and circumstances of which (lawyer) was aware or should have discovered at the time legal services were provided to (plaintiff). A lawyer is negligent if the lawyer fails to discover or recognize the importance of relevant facts or legal principles which reasonably prudent lawyers would discover or recognize or if the lawyer's skill or judgment was not consistent with that exercised by reasonably prudent lawyers. A lawyer is not negligent because of the results of (his) (her) representation, if (his)(her) efforts were those reasonably prudent lawyers would have taken.

[Use this paragraph if the parties stipulate or the trial judge finds as a matter of law that the lawyer presented himself or herself as a specialist in the relevant area of law: Lawyers who present themselves to the public or their clients as having special experience, knowledge, or skill in a particular area of law are held to the standard of care of reasonably prudent lawyers with that special experience, knowledge, or skill. This is the standard you should apply in considering question _____ of the special verdict.]

You have heard testimony during this trial from lawyers who have testified as expert witnesses. The reason for this is because the degree of care, skill, and judgment which a reasonably prudent lawyer would exercise is not a matter within the common knowledge of lay persons. This standard is within the special knowledge of experts in the

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field of law and can only be established by expert testimony. You, therefore, may not speculate or guess what that standard of care, skill, and judgment is in deciding this case, but rather must attempt to determine this from the expert testimony that you heard in this trial.

(Also Give Wis JI-Civil 265.)

SPECIAL VERDICT

1. Was (lawyer) negligent in providing legal services to (plaintiff)?

Answer: _____
Yes or No

COMMENT

This instruction and comment were approved in 1997. The comment was updated in 1998, 2002, 2003, 2016, and 2020. If the status of the lawyer as a specialist is in dispute, see Wis JI-Civil 1023.5A.

Consistent with the supreme court's direction in medical malpractice cases, the Committee has eliminated reference to "guaranteed results" and has framed the duty of lawyers in terms of "reasonable care" rather than in reference to what is "usually exercised" by lawyers. See Nowatske v. Osterloh, 198 Wis. 2d 419, 543 N.W.2d 265 (1996), and Comment to Wis JI Civil 1023.

Elements. The Wisconsin Supreme Court has said that the following rule governs legal malpractice actions:

> In an action against an attorney for negligence or violation of duty, the client has the burden of proving the existence of the relation of attorney and client, the acts constituting the alleged negligence, that the negligence was the proximate cause of the injury, and the fact and extent of the injury alleged. The last element mentioned often involves the burden of showing that, but for the negligence of the attorney, the client would have been successful in the prosecution or defense of an action. Lewandowski v. Continental Casualty Co., 88 Wis.2d 271, 277, 276 N.W.2d 284 (1979). See also Kraft v. Steinhafel, 2015 WI App 62, 364 Wis.2d 672, 869 N.W.2d 506.

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To establish causation and injury in a legal malpractice action, the plaintiff is often compelled to prove the equivalent of two cases in a single proceeding or what has been referred to as a "suit within a suit." Lewandowski v. Continental Casualty Co., 88 Wis.2d 271, 277, 276 N.W.2d 284 (1979); Helmbrecht v. St. Paul Ins. Co., 122 Wis.2d 94, 103, 362 N.W.2d 118 (1985); see also Pierce v. Colwell, 209 Wis.2d 355, 563 N.W.2d 166 (Ct. App. 1997). This entails establishing that, "'but for the negligence of the attorney, the client would have been successful in the prosecution or defense of an action.'" Lewandowski, 88 Wis.2d at 277, citing 7 Am. Jur. 2d, Attorneys at Law, sec. 188 at 156 (1963).

In Helmbrecht v. St. Paul Ins. Co., supra, the court made several important holdings which cleared up some uncertainty. First, in calculating damages due to the loss of a claim, an objective standard should be used, i.e., what a reasonable judge (jury) would have awarded in the initial action. Second, the court said the Code of Professional Responsibility, although beneficial as an ethical guide, "does not exhaustively define the obligations an attorney owes his client," nor does it "undertake to define standards for civil liability of lawyers for professional conduct." 122 Wis.2d at 111.

In Denzer v. Rouse, 48 Wis.2d 528, 534 180 N.W.2d 521 (1970), the court said that "between the end points of competence and malpractice lies a broad area of difficult and complex situations in which an attorney is bound to exercise his best judgment in the light of his education and experience, but is not held to a standard of perfection or infallibility of judgment."

Cause. The court of appeals in 1997 considered the following question: When a client is represented sequentially by two lawyers, both of whom were arguably negligent with respect to the same manner, can the first lawyer's alleged negligence be a cause of the client's damages if the client would not have sustained any damage if the second lawyer could have prevented the harm but did not? The court of appeals concluded that the answer to this question was "no." Seltrecht v. Bremer, 214 Wis.2d 110, 571 N.W.2d 686 (Ct. App. 1997).

Outcome of Representation. In DeThorne v. Bakken, 196 Wis. 2d 713, 539 N.W.2d 695 (1995), the court of appeals considered a lawyer's mistaken judgment that was made in good faith. The court stated: "we will not hold attorneys responsible when their decisions are ones that a reasonably prudent attorney might make even though they are later determined by a court of law to be erroneous." Id. at 724. The Committee believes that juries should be informed that the outcome of the representation is not determinative of lawyer's negligence. The jury should, instead, determine whether the representation conformed with reasonable care, considering all of the evidence.

Nature of Representation. If there is a dispute concerning the nature or scope of the representation, add the following paragraph:

Whether (lawyer) has discharged (his) (her) duty depends on the purpose for which (lawyer) was retained or agreed to provide representation. The purpose (or scope) of the representation for which the (lawyer) was retained is for you to determine from the evidence. It is irrelevant to the determination of the lawyer's negligence whether the lawyer was paid.

Specialists. The court of appeals has adopted the higher standard of care for lawyers who represent themselves as specialists in Duffy Law Office v. Tank Transport, Inc., 194 Wis. 2d 675, 535 N.W.2d 91 (1995). The Committee recommends use of the higher standard paragraph when the trial court finds that there is credible evidence of such representation by the lawyer. See also JI-Civil 1023.5A. Since most areas of practice do not have State Bar sanctioned specialty certification, these

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cases will generally present a question of fact concerning whether the lawyer held himself or herself out as a specialist to the public or to the particular client. (Patent and admiralty practice have recognition as specialists by policy and tradition in federal courts.)

Contributory Negligence. The contributory negligence of a client can be a defense in a legal malpractice action. Gustavson v. O'Brien, supra at 204.

Tort Versus Contract Claim. The Wisconsin Supreme Court has stated that legal malpractice may give rise to either a tort claim or a contract claim. The tort claim arises from a breach of the attorney's common law duty; whereas, the contract claim arises from a breach of a duty created by contractual agreement between the attorney and the client. See Milwaukee County v. Schmidt, Gardner, and Erickson, 43 Wis.2d 445, 168 N.W.2d 559 (1969); Klingbeil v. Saucerman, 165 Wis. 60, 160 N.W. 1051 (1917).

Expert Testimony. Expert testimony is not required to establish a standard of care in cases involving conduct not necessarily related to legal expertise where the matters to be proved do not involve special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of mankind and which require special learning, study, or experience. Nor is expert testimony required where no issue is raised as to defendant's responsibility, where the negligence of defendant is apparent and undisputed, and where the record discloses obvious and explicit carelessness in defendant's failure to meet the duty of care owed to plaintiff for the court will not require expert testimony to define further that which is already abundantly clear. Olfe v. Gordon, 93 Wis.2d 173, 286 N.W.2d 573 (1980). See also Kraft v. Steinhafel, 2015 WI App 62, 364 Wis.2d 672, 869 N.W.2d 506; DeThorne v. Bakken, 196 Wis. 2d 713, 718, 539 N.W.2d 695 (1995). In Olfe v. Gordon, supra, the client's claim alleged negligence by the attorney in failing to follow specific instructions. The court concluded that proof of this negligence does not require expert testimony. Such a claim is controlled by the law of agency. Thus, the duties of care owed by the attorney to the client are established not by the legal profession's standards but by the law of agency. The court held that a jury is competent to understand and apply the standards of care to which agents are held. Olfe v. Gordon, supra at 184 (citing Wis JI-Civil 4000, Agency: Definition, and Wis JI-Civil 4020, Agent's Duties Owed to Principal).

Damages. The supreme court has said it is appropriate, in some complex cases, for the trial judge to determine reasonable attorney's fees as a matter of law. See Glamann v. St. Paul Fire & Marine Ins., 144 Wis.2d 865, 424 N.W.2d 924 (1988). For the determination and awarding of attorney fees (both trial and appellate), see Glamann, supra at 870-75.

Legal Malpractice Claim for Criminal Defense. The court of appeals has held that, in a legal malpractice claim for criminal defense, the plaintiff must prove that he or she did not commit the offenses of which he or she was convicted. Hicks v. Nunnery, 2002 WI App 87, 253 Wis.2d 721, 643 N.W.2d 809. The court said this proof requirement is based on public policy considerations. In such a case, the following language is suggested:

> Question no. _____ asks whether (Plaintiff) is innocent of the charge of _____. This charge consists of the following elements: (Here explain the elements of the offense from the appropriate instruction in Wisconsin Jury Instructions-Criminal.)
>
> (Plaintiff) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (he) (she) is innocent.

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[Give JI-Civil 200, Ordinary Burden of Proof]

The suggested question for the special verdict is:

Was Plaintiff innocent of the charge of _____?

The court of appeals in Hicks states that "the question of plaintiff's innocence is in addition to, not a substitute for, a jury question regarding whether the plaintiff would have been found not guilty absent the defendant's negligence. A defendant's negligence must . . . have been a substantial factor contributing to the plaintiff's conviction." Thus, the questions of existence of the attorney-client relationship, negligence, causation and damages would be first submitted for the jury's consideration.

Nonliability of an Attorney to a Non-Client. A longstanding rule in Wisconsin is that an attorney is not liable to a non-client for "acts committed in the exercise of his [or her] duties as an attorney. See Auric v. Continental Cas. Co., 111 Wis.2d 507, 512, 331 N.W.2d 325 (1983). However, there are exceptions to this rule in the context of estate planning. The "Auric exception," established in Auric, holds that the beneficiary of a will may maintain an action against an attorney who negligently drafted or supervised the execution of a will even though the beneficiary is a third-party not in privity with the attorney. In general, this exception allows a named beneficiary to sue an attorney for malpractice when the beneficiary can show that he or she was harmed by attorney negligence that frustrated the intent of the attorney's client.

In 2009, the post-Auric decision of Tensfeldt v. Haberman, 2009 WI 77, 319 Wis.2d 329, 768 N.W.2d 641 seemed to narrowly limit the Auric exception to negligence by an attorney in drafting or supervising the execution of an estate-planning document which resulted in a loss to a named beneficiary. However, the supreme court's holding in MacLeish v. Boardman Clark LLP, 2019 WI 31, 386 Wis.2d 50, 924 N.W.2d 799, provided that "[t]he narrow Auric exception to the rule of nonliability of an attorney to a non-client applies to the administration of an estate in addition to the drafting of a will. That is, a non-client who is a named beneficiary in a will has standing to sue an attorney for malpractice if the beneficiary can demonstrate that the attorney's negligent administration of the estate thwarted the testator's clear intent." Id. at ¶48.

For estate planning post-MacLeish, see Pence v. Slate, 387 Wis.2d 685, 928 N.W.2d 806 (Table), 2019 WI App 26.

Negligence; Standard of Care. See the comment to Wis JI-Civil 1005.

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1023.5A PROFESSIONAL NEGLIGENCE: LEGAL—STATUS OF LAWYER AS SPECIALIST IS IN DISPUTE

In providing legal services to a client, it is a lawyer's duty to use the degree of care, skill, and judgment which reasonably prudent lawyers practicing in this state would exercise under like or similar circumstances. A failure to conform to this standard is negligence. The burden is on (plaintiff) to prove that (lawyer) was negligent.

You are to determine whether (lawyer) was negligent in representing (plaintiff) in light of the facts and circumstances of which (lawyer) was aware or should have discovered at the time legal services were provided to (plaintiff). A lawyer is negligent if the lawyer fails to discover relevant facts or legal principles which reasonably prudent lawyers would discover or if the lawyer's skill or judgment was not consistent with that exercised by reasonably prudent lawyers. A lawyer is not negligent because of the results of (his)(her) representation if (his)(her) efforts were those reasonably prudent lawyers would have taken.

Lawyers who present themselves to the public or their clients as having special experience, knowledge, or skill in a particular area of law are held to the standard of care of reasonably prudent lawyers with that special experience, knowledge, or skill. It is for you to determine from the evidence whether (lawyer) presented (himself)(herself) to the public or (client) as having special experience, knowledge, or skill in the relevant area of law. If your answer to question ___ is "yes," that (lawyer) held (himself) (herself) out as a specialist, you should apply the standard of a specialist in answering question ___. If your answer to question ___ is "no," you should not apply the standard of a specialist when answering question ___.

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You have heard testimony during this trial from lawyers who have testified as expert witnesses. The reason for this is because the degree of care, skill, and judgment which a reasonably prudent lawyer would exercise is not a matter within the common knowledge of lay persons. This standard is within the special knowledge of experts in the field of law and can only be established by expert testimony. You, therefore, may not speculate or guess what that standard of care, skill, and judgment is in deciding this case but rather must attempt to determine this from the expert testimony that you heard in this trial.

(Also Give Wis JI-Civil 265.)

SPECIAL VERDICT - SPECIALIST STATUS IN DISPUTE

1. Did (lawyer) present (himself)(herself) to the public or (plaintiff) as having special experience, knowledge, or skill in (insert specialty, e.g., personal injury law)?

Answer: _____
Yes or No

If your answer to question 1 is yes, you should apply the higher standard of a specialist in considering question 2. If your answer to question 1 is no, you should apply the standard of a general practitioner in considering question 2.

2. Was (lawyer) negligent in (his)(her) representation of (plaintiff)?

Answer: _____
Yes or No

COMMENT

This instruction and comment were approved in 1997. See Comment to JI-Civil 1023.5. In particular, note the discussion of specialist status in Duffy Law Office v. Tank Transport, Inc., 194 Wis. 2d 675, 535 N.W.2d 91 (1995), and DeThorne v. Bakken, 196 Wis. 2d 713, 539 N.W.2d 695 (1995).

If there is a dispute concerning the nature or scope of the representation, add this paragraph:

Whether a lawyer has discharged (his)(her) duty depends on the purpose for which the lawyer was retained or agreed to provide representation. The purpose of the representation for which the lawyer was retained is for you to determine from the evidence.

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1023.6 NEGLIGENCE OF INSURANCE AGENT

An insurance agent, such as (defendant), must use the degree of care, skill, and judgment which is usually exercised under the same or similar circumstances by insurance agents licensed to sell insurance in Wisconsin.

While there is no duty to advise the policy holder of coverages available, the agent must use reasonable skill and diligence to put into effect the insurance coverage requested by his or her policy holder, act in good faith towards that policy holder, and inform him or her of the minimum statutory requirements. A failure on the agent's part to use that skill or diligence constitutes negligence.

[If evidence as to a special relationship is shown, then add the following:

(Plaintiff) contends that a special relationship existed between (him)(her) and (defendant).

If a special relationship did exist, then _____ had the duty to advise _____ about the types of insurance coverages that would be available to (him)(her) and the amount of insurance coverage that would be appropriate for (him)(her).

In determining whether a special relationship existed, you should consider the following factors:

1. Whether (defendant) held (himself)(herself) out to the public as a skilled insurance advisor or consultant;
2. Whether (defendant) took it upon (himself)(herself) to actually advise (plaintiff) on the coverages (plaintiff) should have beyond the usual relationship of agent and policy holder;

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3. Whether the policy holder relied on the agent's expertise;

4. Whether an additional fee was paid to the agent for special consultation and advice; and

5. Whether there was a long established relationship of entrustment between the agent and the insured.

If you find that a special relationship existed between (plaintiff) and (defendant), then (defendant) had the duty to advise (plaintiff) about available insurance coverages and recommend the appropriate amount of insurance coverage necessary to protect the insured.]

[If contributory negligence is an issue, then give the following:

An insured, such as (plaintiff), has a duty to use ordinary care when purchasing an insurance policy. Ordinary care is that degree of care that a reasonably prudent person would use under the same or similar circumstances.

When purchasing a policy, an insured must advise his or her agent of the type of insurance wanted, including the limits of the policy to be issued. An insured must read the policy once it is delivered to determine whether it provides the insurance coverage requested. However, an insured is not bound to comprehend every term and condition in the policy. An insured is only required to act as a reasonably prudent person would act under the same or similar circumstances. A failure to exercise ordinary care by the insured constitutes negligence.]

COMMENT

This instruction was approved by the Committee in 1992. The comment was updated in 1995 and 2016.

The general duty of care of an insurance agent does not include a duty to advise a prospective policy holder regarding the availability or adequacy of certain types of coverages, including underinsured motorist

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coverage. Nelson v. Davidson, 155 Wis. 2d 674, 680-82, 456 N.W.2d 343 (1990). Only paragraphs 1 and 2 apply to a case premised upon an insurance agent's failure to procure coverage that a client actually requested the agent to procure. See Appleton Chinese Food v. Murken Ins., 185 Wis.2d 791, 519 N.W.2d 674 (1994).

Absent a special relationship, an agent's sole duty is to act in good faith, carry out the insured's instructions, and mention minimum statutory requirements. Nelson, at 681-82, Tackes v. Milwaukee Carpenters Health Fund, 164 Wis.2d 707, 476 N.W.2d 311 (Ct. App. 1991).

To constitute a special relationship between the parties, the agent must have assumed the role of a highly skilled consultant. Nelson, at 683-84.

The agent has no duty to advise a prospective insured regarding the availability of higher uninsured motorist limits than selected by the insured. The policy holder determines whether additional protection is necessary and whether to pay higher premiums for that additional coverage. Meyer v. Norgaard, 160 Wis.2d 794, 467 N.W.2d 141 (Ct. App. 1991), rev. denied.

Negligence; Standard of Care. See the comment to Wis JI-Civil 1005.

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1023.7 PROFESSIONAL NEGLIGENCE: REGISTERED NURSES AND LICENSED TECHNICIANS PERFORMING SKILLED SERVICES

At the time in question, (defendant) was a (registered nurse) (licensed technician) serving in this capacity at _____ Hospital. As a (registered nurse) (licensed technician), it was (defendant)'s duty in (describe the service rendered (plaintiff) to use the degree of care, skill, and judgment which reasonable (registered nurses) (licensed technicians) would exercise in the same or similar circumstances, having due regard for the state of learning, education, experience, and knowledge possessed by (registered nurses) (licensed technicians) at the time in question. A (registered nurse) (licensed technician) who fails to conform to this standard is negligent. The burden is on (plaintiff) to prove that (defendant) was negligent.

A (registered nurse) (licensed technician) is not negligent solely because a bad result may have followed (describe the professional service rendered by the defendant). The standard you must apply in determining if (defendant) was negligent is whether (defendant) failed to use the degree of care, skill, and judgment which a reasonable (registered nurse) (licensed technician) would exercise at the time the service was rendered.

You have heard considerable testimony during this trial from experts in the field of nursing and medicine who have been called as expert witnesses by both sides. The reason for this is because the degree of care, skill, and judgment which a reasonable (registered nurse) (licensed technician) would exercise is not a matter within the common knowledge of laypersons. These standards are within the special knowledge of experts in the field of nursing and medicine and can only be established by their testimony. You, therefore, may

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not speculate or guess what those standards of care, skill, and judgment are in deciding this case, but rather must attempt to determine this from the expert testimony that you have heard during this trial. (In determining the weight to be given an opinion, you should consider the qualifications and credibility of the expert and whether the reasons for the opinion are based on facts in the case. You are not bound by any expert's opinion.)

(Insert appropriate burden of proof instruction.)

(Insert appropriate cause instruction.)

COMMENT

The instruction and comment were originally approved in 1974 and revised in 1988, 1998, 2011, and 2016.

The instruction was revised in 1998 to conform to the explanation of professional negligence in Nowatske v. Osterloh, 198 Wis.2d 419, 543 N.W.2d 265 (1996). See Comment to Wis JI-Civil 1023. The previous version of this instruction based the standard of care on what was "usually exercised" by registered nurses or licensed technicians or what "the average" registered nurse or technician would do.

Tills v. Elmbrook Memorial Hosp., Inc., 48 Wis.2d 665, 180 N.W.2d 699 (1970); Shier v. Freedman, 58 Wis.2d 269, 206 N.W.2d 166 (1973); Trogun v. Fruchtman, 58 Wis.2d 596, 207 N.W.2d 297 (1973).

Expert Testimony. For the requirement of expert testimony on the standard of professional nursing care, see Kujawski v. Arbor View Health Care Center, 139 Wis.2d 455, 407 N.W.2d 249 (1987). In 2011, the Committee added language which instruct the jury that in determining the weight to be given expert testimony, it should consider the qualifications and credibility of the expert and whether the reasons for the opinion are based on facts in the case. The jury is further instructed that it is not bound by any expert's opinion.

Negligence; Standard of Care. See the comment to Wis JI-Civil 1005.

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1023.8 PROFESSIONAL NEGLIGENCE: CHIROPRACTOR—TREATMENT

In providing chiropractic care to (plaintiff), (chiropractor) was required to use the degree of care, skill, and judgment which reasonable chiropractors would exercise in the like or similar circumstances, having due regard for the state of chiropractic knowledge at the time (plaintiff) was treated. A chiropractor who fails to conform to this standard is negligent. The burden is on (plaintiff) to prove that (chiropractor) was negligent.

A chiropractor is not negligent, however, for failing to use the highest degree of care, skill, and judgment or solely because a bad result may have followed (his) (her) care and treatment. The standard you must apply in determining if (chiropractor) was negligent is whether (chiropractor) failed to use the degree of care, skill, and judgment which reasonable chiropractors would exercise given the state of chiropractic knowledge at the time of the treatment in issue.

[Use this paragraph only if there is evidence of two or more alternative methods of chiropractic treatment recognized as reasonable: If you find from the evidence that more than one method of chiropractic treatment for (plaintiff)'s condition was recognized as reasonable given the state of chiropractic knowledge at that time, (chiropractor) was at liberty to select any of the recognized methods. (Chiropractor) was not negligent because (he) (she) chose to use one of these recognized treatment methods rather than another recognized method if (he) (she) used reasonable care, skill, and judgment in administering the method.]

You have heard testimony during this trial from witnesses who have testified as experts. The reason for this is because the degree of care, skill, and judgment which a reasonable chiropractor would exercise is not a matter within the common knowledge of

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laypersons. This standard is within the special knowledge of experts and can only be established by the testimony of experts. You, therefore, may not speculate or guess what the standard of care, skill, and judgment is in deciding this case but rather must attempt to determine it from the expert testimony that you heard during this trial.

(Insert the appropriate cause language. To avoid duplication, JI-1500 should not be given if the following two bracketed paragraphs are used.)

[The cause question asks whether there was a causal connection between negligence on the part of (chiropractor) and (plaintiff)'s (injury) (condition). A person's negligence is a cause of a plaintiff's (injury) (condition) if the negligence was a substantial factor in producing the present condition of the plaintiff's health. This question does not ask about "the cause" but rather "a cause." The reason for this is that there can be more than one cause of (an injury) (a condition). The negligence of one (or more) person(s) can cause (an injury) (a condition), or (an injury) (a condition) can be the result of the natural progression of the (injury) (condition). In addition, (an injury) (a condition) can be caused jointly by a person's negligence and the natural progression of the (injury) (condition).]

[If you conclude from the evidence that the present condition of (plaintiff)'s health was caused jointly by (chiropractor)'s negligence and the natural progression of (plaintiff)'s (injury) (disease), you should find that (chiropractor)'s negligence was a cause of the (plaintiff)'s present condition of health.]

[The evidence indicates without dispute that when (plaintiff) retained the services of (chiropractor) and placed (himself) (herself) under (chiropractor)'s care, (plaintiff) was suffering from some (disability resulting from injuries sustained in an accident) (illness or

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disease). (Plaintiff)'s then physical condition cannot be regarded by you in any way as having been caused or contributed to by any negligence on the part of (chiropractor). This question asks you to determine whether the condition of (plaintiff)'s health, as it was when (plaintiff) placed (himself) (herself) under (chiropractor)'s care, has been aggravated or further impaired as a natural result of the negligence of (chiropractor)'s treatment.]

(Insert appropriate damage instructions.)

[(Plaintiff) sustained injuries before the treatment by (chiropractor). Such injuries have caused (and could in the future cause) (plaintiff) to endure pain and suffering and incur some disability. In answering these questions on damages, you will entirely exclude from your consideration all damages which resulted from the original injury; you will consider only the damages (plaintiff) sustained as a result of the treatment by (chiropractor).]

[It will, therefore, be necessary for you to distinguish and separate, first, the natural results in damages that flow from (plaintiff)'s original (illness) (injuries) and, second, those that flow from (chiropractor)'s treatment and allow (plaintiff) only the damages that naturally resulted from the treatment by (chiropractor).]

SPECIAL VERDICT

Was (chiropractor) negligent in (his) (her) care and treatment of (plaintiff)?

Answer: _____
Yes or No

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COMMENT

This instruction and comment were approved in 1997. The comment was updated in 1999, 2005, 2015, and 2016. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

This instruction follows the format for explaining professional negligence adopted by the Committee in Wis JI-Civil 1023. The standard, "what a reasonable chiropractor would have done," follows the reasoning in Nowatske v. Osterloh, 198 Wis.2d 419, 543 N.W.2d 265 (1996), and Kerkman v. Hintz, 142 Wis.2d 404, 418 N.W.2d 795 (1988).

Chiropractic Malpractice. The standard of care for a chiropractor is different than that imposed upon a medical doctor. Kerkman v. Hintz, 142 Wis.2d 404, 418 N.W.2d 795 (1988).

A chiropractor has a duty to (1) determine whether the patient presents a problem which is treatable through chiropractic means; (2) refrain from further chiropractic treatment when an average chiropractic should be aware that the patient's condition will not be responsive to further treatment; and (3) if the ailment presented is outside the scope of chiropractic care, inform the patient that the ailment is not treatable through chiropractic means. In determining whether a chiropractor breaches these duties, the chiropractor is held to that degree of care, diligence, judgment, and skill which is exercised by an average chiropractor under like or similar circumstances. A chiropractor does not have a duty to refer the patient to a medical doctor. Kerkman v. Hintz, supra at 419-21.

As to the type of expert testimony which is required on the issue of chiropractic negligence, Kerkman v. Hintz, supra at 423, states:

> . . ., a chiropractor is qualified to testify regarding the practice of chiropractic and the corresponding standard of care. . . . Moreover, one who is not licensed to practice chiropractic may testify regarding the standard of care for a chiropractor if qualified as an expert in the area in which testimony will be given.

The Committee is still evaluating whether a chiropractor who claims to be a specialist or have special skills in treating certain conditions, e.g., sports injuries, is held to a higher standard of care. See Duffy Law Office v. Tank Transport, Inc., 194 Wis.2d 675, 535 N.W.2d 91 (1995).

For a discussion of a chiropractor's duty to recognize a medical condition, see Murphy v. Nordhagen, 222 Wis.2d 574, 588 N.W.2d 96 (Ct. App. 1998).

Negligence; Standard of Care. See the comment to Wis JI-Civil 1005.

Duty to Refer. In a footnote in Hannemann v. Boyson, 2005 WI 94, 282 Wis.2d 664, 698 N.W.2d 714, fn. 11, the court noted the plaintiff argued that the chiropractor-defendant was negligent because he did not tell the plaintiff to see a medical doctor. The court addressed this argument by noting that it has previously held that a chiropractor does not have a duty to refer a patient who is not treatable through chiropractic means to a medical doctor.

Duty of a Chiropractor to Inform a Patient. See Wis JI-Civil 1023.15, 1023.16, and 1023.17.

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1023.9 PROFESSIONAL NEGLIGENCE: CHIROPRACTOR—DETERMINING TREATABILITY BY CHIROPRACTIC MEANS

A chiropractor is required to use the degree of care, skill, and judgment which is exercised by a reasonable chiropractor under like or similar circumstances. A chiropractor who fails to conform to this standard is negligent. The burden is on the (plaintiff) to prove that (chiropractor) was negligent.

A chiropractor may only treat a patient within the scope of chiropractic knowledge and training. If the patient has a problem which is treatable through chiropractic means, the chiropractor may provide chiropractic treatment to the patient. However, the chiropractor may not provide chiropractic treatment when a reasonable chiropractor would be aware that the patient's condition will not be responsive to chiropractic treatment. A chiropractor's decision to treat or to stop treatment must be tested according to chiropractic standards.

(**Give the following if the claim relates to the duty to inform or refer:** If the patient's condition is outside the scope of chiropractic treatment, a chiropractor must inform the patient that the condition presented is not treatable through chiropractic means. The chiropractor does not have the duty to refer the patient to a medical doctor.)

Expert witnesses have testified concerning the standard of care applicable to chiropractors. The reason for this is because the degree of care, skill, and judgment which a reasonable chiropractor would exercise is not a matter within the common knowledge of laypersons. This standard is within the special knowledge of experts and can only be established by testimony of experts. Therefore, you may not speculate or guess what the standard of care, skill, and judgment is in deciding this case but rather must attempt to determine it from the expert testimony that you heard during this trial.

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COMMENT

This instruction and comment were approved in 1997. The comment was updated in 1999.

Kerkman v. Hintz, 142 Wis.2d 404, 418 N.W.2d 795 (1988); Murphy v. Nordhagen, 222 Wis.2d 574, 588 N.W.2d 96 (Ct. App. 1998). In Kerkman, the court explained the duties of a chiropractor in the following way:

In summary, we hold that a chiropractor has a duty to (1) determine whether the patient presents a problem which is treatable through chiropractic means; (2) refrain from further chiropractic treatment when a reasonable chiropractor should be aware that the patient's condition will not be responsive to further treatment; and (3) if the ailment presented is outside the scope of chiropractic care, inform the patient that the ailment is not treatable through chiropractic means. In determining whether a chiropractor breaches these duties, the chiropractor is held to that degree of care, diligence, judgment, and skill which is exercised by a reasonable chiropractor under like or similar circumstances.

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1023.14 PROFESSIONAL NEGLIGENCE: DENTAL

In [(treating) (diagnosing) (plaintiff)'s (injuries) (condition)], (dentist) was required to use the degree of care, skill, and judgment which reasonable (dentists who are in general practice) (specialists who practice the specialty which (dentist) practices) would exercise in the same or similar circumstances, having due regard for the state of dental science at the time (plaintiff) was (treated) (diagnosed). A dentist who fails to conform to this standard is negligent. The burden is on (plaintiff) to prove that (dentist) was negligent.

A dentist is not negligent, however, for failing to use the highest degree of care, skill, and judgment or solely because a bad result may have followed (his) (her) care and (treatment) (diagnosis). The standard you must apply in determining if (dentist) was negligent is whether (dentist) failed to use the degree of care, skill, and judgment which reasonable (dentists who are in general practice) (specialists who practice the specialty which (dentist) practices) would exercise given the state of dental knowledge at the time of the (treatment) (diagnosis) of (plaintiff).

[Use this paragraph only if there is evidence of two or more alternative methods of dental treatment or diagnosis recognized as reasonable: If you find from the evidence that more than one method of (treatment for) (diagnosing) (plaintiff)'s (injuries) (condition) was recognized as reasonable given the state of dental knowledge at that time, (dentist) was at liberty to select any of the recognized methods. (Dentist) was not negligent because (he) (she) chose to use one of these recognized (treatment) (diagnosis) methods rather than another recognized method if (he) (she) used reasonable care, skill, and judgment in administering the method.]

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You have heard testimony during this trial from witnesses who have testified as experts. The reason for this is because the degree of care, skill, and judgment which a reasonable dentist would exercise is not a matter within the common knowledge of laypersons. This standard is within the special knowledge of experts and can only be established by the testimony of experts. You, therefore, may not speculate or guess what the standard of care, skill, and judgment is in deciding this case, but rather must attempt to determine it from the expert testimony that you heard during this trial.

[Insert the appropriate cause instruction. To avoid duplication, JI-1500 should not be given if the following two bracketed paragraphs are used.]

[The cause question asks whether there was a causal connection between negligence on the part of (dentist) and (plaintiff)'s (injury) (condition). A person's negligence is a cause of a plaintiff's (injury) (condition) if the negligence was a substantial factor in producing the present condition of the plaintiff's health. This question does not ask about "the cause" but rather "a cause." The reason for this is that there can be more than one cause of (an injury) (a condition). The negligence of one (or more) person(s) can cause (an injury) (a condition), or (an injury) (a condition) can be the result of the natural progression of (the injury) (the condition). In addition, the (injury) (condition) can be caused jointly by a person's negligence and also the natural progression of the (injury) (condition).]

[If you conclude from the evidence that the present condition of (plaintiff)'s health was caused jointly by (dentist)'s negligence and also the natural progression of (plaintiff)'s (injury) (disease), you should find that the (dentist)'s negligence was a cause of the (plaintiff)'s present condition.]

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[The evidence indicates without dispute that when (plaintiff) retained the services of (dentist) and placed (himself) (herself) under (dentist)'s care, (plaintiff) was suffering from some (disability resulting from injuries sustained in an accident) (illness or disease). (Plaintiff)'s then physical condition cannot be regarded by you in any way as having been caused or contributed to by any negligence on the part of (dentist). This question asks you to determine whether the condition of (plaintiff)'s health, as it was when (plaintiff) placed (himself) (herself) under (dentist)'s care, has been aggravated or further impaired as a natural result of the negligence of (dentist)'s treatment.]

[Insert appropriate damage instructions.]

[(Plaintiff) sustained injuries before the treatment by (dentist). Such injuries have caused (and could in the future cause) (plaintiff) to endure pain and suffering and incur some disability. In answering these questions on damages, you will entirely exclude from your consideration all damages which resulted from the original injury; you will consider only the damages (plaintiff) sustained as a result of the treatment by (dentist).]

[It will, therefore, be necessary for you to distinguish and separate, first, the natural results in damages that flow from (plaintiff)'s original (condition) (injuries) and, second, those that flow from (dentist)'s treatment and allow (plaintiff) only the damages that naturally resulted from the treatment by (dentist).]

COMMENT

This instruction and comment were approved in 1998 as (JI-Civil 1023.10). The comment was updated in 2015 and 2016. The instruction was re-numbered in the January 2005 supplement. The instruction reflects the changes recommended by the Wisconsin Supreme Court for instructing juries on professional negligence. Nowatske v. Osterloh, 198 Wis.2d 419, 543 N.W.2d 25 (1996).

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Expert Testimony. Expert Testimony is required. See Albert v. Waelti, 133 Wis.2d 142, 394 N.W.2d 752 (Ct. App. 1986). The degree of skill required of a dentist performing dental procedures, such as a root canal or removal of a cap, and the question of whether a violation of that standard caused the plaintiff's medical condition are not within the common knowledge of laypersons. Expert testimony is required on both these issues, except in the rare case where the common knowledge of laypersons affords a basis for finding negligence. In Waelti, the court of appeals saw no distinction between physicians and dentists.

Duty to Inform a Patient. See Wis JI-Civil 1023.15, 1023.16, and 1023.17.

Negligence; Standard of Care. See the comment to Wis JI-Civil 1005.

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1023.15 PROFESSIONAL NEGLIGENCE: CHIROPRACTOR, DENTIST, OPTOMETRIST, OR PODIATRIST: DUTY TO INFORM A PATIENT: SPECIAL VERDICT

Questions 1 and 2 of the special verdict form relate to the issue of the duty of a (chiropractor) (dentist) (optometrist) (podiatrist) to inform a patient and read as follows:

QUESTION 1: On (date), was (chiropractor) (dentist) (optometrist) (podiatrist) negligent in informing (patient) about the availability of reasonable alternate modes of treatment and about the risks and benefits of these treatments?

Answer: _____

Yes or No

QUESTION 2: If you have answered question 1 "yes," then answer this question: Was the negligence of (chiropractor) (dentist) (optometrist) (podiatrist) in informing (patient) a cause of injury to (patient)?

Answer: _____

Yes or No

COMMENT

This instruction and comment were approved in 2015.

The duty of chiropractors, dentists, optometrists, and podiatrists to inform patients about the availability of reasonable alternate modes of treatment and about the risks and benefits of these alternate treatments was codified in 2013 Wisconsin Act 345 (effective April 25, 2014). The act created Wis. Stats § 446.08 (chiropractors); § 447.40 (dentists); § 448.697 (podiatrists); and § 449.25 (optometrists).

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1023.16 PROFESSIONAL NEGLIGENCE: CHIROPRACTOR, DENTIST, OPTOMETRIST, OR PODIATRIST: DUTY TO INFORM A PATIENT

Question _____ asks: On (date), was Dr. _____ negligent in informing (patient) about the availability of reasonable alternate modes of treatment and about the risks and benefits of these treatments? A (chiropractor) (dentist) (optometrist) (podiatrist) has the duty to inform (his) (her) patient about reasonable alternate modes of treatment available to (patient) and about the risks and benefits of the treatments that a reasonable (chiropractor) (dentist) (optometrist) (podiatrist) would know and disclose under the circumstances. If a (chiropractor) (dentist) (optometrist) (podiatrist) fails to perform this duty to inform, (he) (she) is negligent in informing (his) (her) patient.

A (chiropractor) (dentist) (optometrist) (podiatrist)'s duty to inform (his) (her) patient does not require disclosure of (include as applicable):

- Detailed technical information that in all probability a patient would not understand.
- Risks apparent or known to the patient.
- Extremely remote possibilities that might falsely or detrimentally alarm the patient.
- Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment.
- Information in cases where the patient is incapable of consenting.
- Information about alternate modes of treatment for any condition the (chiropractor) (dentist) (optometrist) (podiatrist) has not included in his or her

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diagnosis at the time the (chiropractor) (dentist) (optometrist) (podiatrist) informs the patient.

You have heard testimony during this trial from (chiropractors) (dentists) (optometrists) (podiatrists) who have testified as expert witnesses. This is because information about the availability of reasonable alternate modes of treatment and about the risks and benefits of the treatments that a reasonable (chiropractor) (dentist) (optometrist) (podiatrist) would disclose to a patient in the circumstances of this case is not a matter within the common knowledge of lay persons. The reasonable (chiropractor) (dentist) (optometrist) (podiatrist)'s standard of informing a patient is within the special knowledge of experts in the field of (chiropractor) (dentistry) (optometry) (podiatry) and can only be established by the testimony of experts. You may not speculate or guess what the standard of informing a patient is in deciding this case, but rather must attempt to determine it from the expert testimony that you have heard during this trial. In determining the weight to be given an opinion, you should consider the qualifications and credibility of the expert and whether reasons for the opinion are based on facts in the case. You are not bound by any expert's opinion.

COMMENT

This instruction and comment were approved in 2015.

The duty of chiropractors, dentists, optometrists, and podiatrists to inform patients about the availability of reasonable alternate modes of treatment and about the risks and benefits of these alternate treatments was codified in 2013 Wisconsin Act 345 (effective April 25, 2014). The act created Wis. Stats § 446.08 (chiropractors); § 447.40 (dentists); § 448.697 (podiatrists); and § 449.25 (optometrists).

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1023.17 PROFESSIONAL NEGLIGENCE: CHIROPRACTOR, DENTIST, OPTOMETRIST, OR PODIATRIST: DUTY TO INFORM A PATIENT: CAUSE

Question _____ asks: was (chiropractor) (dentist) (optometrist) (podiatrist)'s negligence in informing (plaintiff) a cause of injury to (plaintiff)? A (chiropractor) (dentist) (optometrist) (podiatrist)'s negligence in informing is a cause of a patient's injury if the negligence was a substantial factor in producing the patient's injury. This question does not ask about "the cause" but rather "a cause." The reason for this is that there can be more than one cause of an injury.

COMMENT

This instruction and comment were approved in 2015.

The duty of chiropractors, dentists, optometrists, and podiatrists to inform patients about the availability of reasonable alternate modes of treatment and about the risks and benefits of these alternate treatments was codified in 2013 Wisconsin Act 345 (effective April 25, 2014). The act created Wis. Stats § 446.08 (chiropractors); § 447.40 (dentists); § 448.697 (podiatrists); and § 449.25 (optometrists).

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1024 PROFESSIONAL NEGLIGENCE: MEDICAL: RES IPSA LOQUITUR

If you find that (name the part of the body that was injured) of (plaintiff) was injured during the course of the operation performed by (doctor) and if you further find (from expert medical testimony in this case) that the injury to the (name the part of the body that was injured) of (plaintiff) is of a kind that does not ordinarily occur if a surgeon exercises proper care and skill, you may infer, from the fact of surgery to the (name the part of the body that was injured) of (plaintiff), that (doctor) failed to exercise that degree of care and skill which reasonably prudent surgeons would exercise. This rule will not apply if (doctor) has offered an explanation for the injury to the (name the part of the body that was injured) of (plaintiff) which satisfies you that the injury to (plaintiff) did not occur through any failure on (doctor)'s part to exercise due care and skill.

COMMENT

The instruction and comment were originally published in 1967. This revision was approved in 1980. The comment was updated in 1997, 2010, and 2017.

Kelley v. Hartford Casualty Ins. Co., 86 Wis.2d 129, 271 N.W.2d 676 (1978); Hoven v. Kelble, 79 Wis.2d 444, 256 N.W.2d 379 (1977); Trogun v. Fruchtman, 58 Wis.2d 569, 207 N.W.2d 297 (1973); Burnside v. Evangelical Deaconess Hosp., 46 Wis.2d 519, 175 N.W.2d 230 (1970); see also Lecander v. Billmeyer, 171 Wis.2d 593, 492 N.W.2d 167 (Ct. App. 1992); Petzel v. Valley Orthopedics Ltd., 2009 WI App. 106, 320 Wis.2d 621, 770 N.W.2d 787.

Whether the evidence presented warrants the giving of a res ipsa loquitur instruction always presents a question of law for the trial court. Fehrman v. Smirl, 20 Wis.2d 1, 28b, 121 N.W.2d 255 (1963).

Res ipsa loquitur was first applied to medical malpractice actions in 1963. Fehrman v. Smirl, 20 Wis.2d 1, 121 N.W.2d 255 (1963). In this case, the supreme court loosened the rule that a physician's negligence could only be proven by expert testimony in situations where the errors were of such a nature that a layperson could conclude from common experience that such mistakes do not happen if the physician had exercised proper skill and care. Res ipsa loquitur is a rule of evidence that permits the jury to draw a permissible inference of the physician's negligence without any direct or expert testimony as to the

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physician's conduct at the time the negligence occurred. Hoven v. Kelble, 79 Wis.2d 444, 256 N.W.2d 379 (1977). The doctrine can be involved in a medical malpractice action when: (1) there is evidence that the event in question would not ordinarily occur unless there was negligence; (2) the agent or instrumentality that caused the harm was within the defendant's exclusive control; and (3) the evidence allows more than speculation but does not fully explain the event. See Lecander v. Billmeyer, 171 Wis.2d 593, 601-02, 492 N.W.2d 167 (Ct. App. 1992); Walker v. Sacred Heart Hospital, Appeal No. 2015AP805 (decided January 4, 2017). In Richards v. Mendivil, 200 Wis.2d 665, 548 N.W.2d 85 (Ct. App. 1996), the court of appeals noted that there is a danger that when a plaintiff relies upon expert testimony that the evidence of negligence will be so substantial that a full and complete explanation of causation is provided and res ipsa loquitur will not be applicable.

The third element discussed above that the evidence allows more than speculation but does not fully explain the event was set forth in Fiumefreddo v. Mclean, 174 Wis.2d 10, 496 N.W.2d 226 (Ct. App. 1993). See also Lecander v. Billmeyer, supra.

In Kelley, the court stated, at 132:

> Before a res ipsa loquitur instruction can be given to a jury, the evidence must conform to these requirements:
>
> (1) The event in question must be of the kind which does not ordinarily occur in the absence of negligence; and (2) the agency or instrumentality causing the harm must have been within the exclusive control of the defendant. Trogun v. Fruchtman, 58 Wis.2d 569, 590, 207 N.W.2d 297 (1973).

With respect to these two conditions, the court in Hoven v. Kelble, supra at 451-52, stated:

> When these two conditions are present, they give rise to a permissive inference of negligence on the part of the defendant which the jury is free to accept or reject. It is settled that the doctrine may be applied in medical malpractice cases and that the likelihood that negligence was the cause may be shown by expert medical testimony in cases where it may not be so inferred on the basis of common knowledge. Fehrman v. Smirl, 20 Wis.2d 1, 21, 22, 25, 26, 121 N.W.2d 255, 122 N.W.2d 439 (1963); Trogun v. Fruchtman, supra.

Need for Expert Testimony. If the jury may be permitted to infer negligence on the basis of layman's knowledge (as whether the plaintiff's shoulder was injured during an appendectomy), omit the phrase in lines two and three "from expert medical testimony in this case."

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1025 NEGLIGENCE OF A COMMON CARRIER

In this case, (defendant) is a common carrier. A common carrier is not required to guarantee the safety of its passengers. However, to discharge the duty that it owes to its passengers, a common carrier must exercise the highest degree of care for their safety. The care required is the highest that can be reasonably exercised by persons of vigilance and foresight when acting under the same or similar circumstances, taking into consideration the type of transportation used and the practical operation of its business as a common carrier.

A failure to exercise the highest degree of care on the part of (defendant) is negligence.

COMMENT

This instruction and comment were originally approved in 1972 and revised in 1985. The comment was updated in 2005.

A similar instruction was approved in Victorson v. Milwaukee & Suburban Transp. Corp., 70 Wis.2d 336, 234 N.W.2d 332 (1975). Spleas v. Milwaukee & Suburban Transp. Corp., 21 Wis.2d 635, 124 N.W.2d 593 (1963); Bradford v. Milwaukee & Suburban Transp. Corp., 25 Wis.2d 161, 130 N.W.2d 282 (1964). See also Boynton Cab Co. v. ILHR Dep't, 96 Wis.2d 396, 416, 291 N.W.2d 850 (1980), and Sabinasz v. Milwaukee & Suburban Transp. Corp., 71 Wis.2d 218, 224, 238 N.W.2d 99 (1976). Werlein v. Milwaukee Elec. Ry & Transp. Corp., 267 Wis. 392, 395, 66 N.W.2d 185, 186-87 (1954); Dauplaise v. Yellow Taxicab Co., 204 Wis. 419, 235 N.W. 771 (1931); Scales v. Boynton Cab Co., 198 Wis. 293, 294-95, 233 N.W. 836 (1929); Ormond v. Wisconsin Power & Light Co., 194 Wis. 305, 307-08, 216 N.W. 489-90 (1927); Anderson v. Yellow Cab Co., 179 Wis. 300, 303, 191 N.W. 748 (1923).

The first paragraph is explained in United States Fidelity & Guar. Co. v. Milwaukee & Suburban Transp. Corp., 18 Wis.2d 1, 117 N.W.2d 708 (1962); Ormond v. Wisconsin Power & Light Co., 194 Wis. 305, 308, 216 N.W. 489 (1927). In Victorson, supra at 346, the court stated:

> Because the operation of a common carrier involves greater risks and potentially more serious harm through negligent conduct than would the operation of freight vehicles or individual modes of transport, recognition must be given to the circumstances in which the ordinarily prudent person is operating.

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For the determination of whether the defendant is a "common carrier," see Hunt v. Clarendon Nat'l Ins. Service, Inc., 2005 WI App 11, 278 Wis.2d 439, 691 N.W.2d 904.

The common-law duty as to common carriers applies equally to taxicabs. Dauplaise v. Yellow Taxicab Co., supra; Scales v. Boynton Cab Co., supra; Anderson v. Yellow Cab Co., supra. But Wis. Stat. § 194.01(5) is a regulatory statute and, hence (see Wis. Stat. § 194.02), is inapplicable to a taxicab company's negligence. Anderson v. Yellow Cab Co., supra.

The common law requires common carriers to use the highest degree of care for the safety of their passengers. This "highest degree of care" language does not create a special area within the field of negligence law. Victorson, supra at 345; Ormond v. Wisconsin Power & Light Co., supra at 308. In Ormond, the court held that the duty imposed upon common carriers to exercise the highest degree of care falls within the class of ordinary care, and their failure to observe that care amounts to ordinary negligence under our classification of negligence. 194 Wis. at 308.

For the liability of a common carrier for injuries to a pedestrian caused by the acts of passenger, see Hamed v. Milwaukee County, 108 Wis.2d 257, 321 N.W.2d 199 (1982); Finken v. Milwaukee County, 120 Wis.2d 69, 353 N.W.2d 827 (Ct. App. 1984).

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1025.5 BAILMENT: DEFINED

A bailment is the delivery of personal property (such as _____) by one person to another for a specific purpose under an express or implied contract with the understanding that the property delivered will be returned or accounted for when the purpose of the bailment has been fulfilled.

A bailment arises when the possession of personal property is temporarily transferred by one person to another but the title to the personal property remains in the hands of the original owner.

One who temporarily transfers possession of personal property to another is known as a bailor. The person who takes possession of the property is known as a bailee.

To be a bailee of property, a person must have such full and complete possession of it as to exclude, for the time of the bailment, the possession of the owner, and the person must have assumed the charge and control of the property as the sole custodian.

COMMENT

The instruction and comment were approved in 1974 and revised in 2009.

Fletcher v. Ingram and others, 46 Wis. 191, 202, 50 N.W. 424 (1879); Bradley v. Harper, 173 Wis. 103, 108, 180 N.W. 130 (1920); American Nat'l Red Cross v. Banks, 265 Wis. 66, 69, 60 N.W.2d 738 (1953); Moore v. Relish, 53 Wis.2d 634, 639, 193 N.W.2d 691 (1972); Bushweiler v. Polk County Bank, 129 Wis.2d 357, 384 N.W.2d 717 (Ct. App. 1986); 8 Am. Jur. 2d. 906, Bailments § 2.

A bailment is created by the delivery of personal property from one person to another to be held temporarily for the benefit of the bailee, the bailor, or both under an express or implied contract Bushweiler.

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1025.6 DUTY OF BAILOR FOR HIRE

It is the duty of the bailor to exercise ordinary care to furnish articles which are reasonably fit for the purpose of the bailment or capable of the use, known or intended, for which they are bailed. A person, who is a bailor, is required, in the exercise of ordinary care, to make all reasonable inspections to determine whether the article is safe for its intended use. A bailor is not an insurer of the safety of the article bailed. It is the bailor's duty to see that the bailed property is reasonably safe for its intended use and free from defects which are known or which could have been known in the exercise of ordinary care by reasonable inspections. Also, it is the bailor's duty to give warnings of any danger of which the bailor is aware.

COMMENT

This instruction and comment were approved in 1977. The comment was reviewed without change in 1989. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

Wadzinski v. Cities Serv. Oil Co, 275 Wis. 84, 91, 80 N.W.2d 816 (1957); Henricksen v. Mc Carroll, 45 Wis.2d 368, 373-75, 173 N.W.2d 153 (1970); Smith v. Pabst, 233 Wis. 489, 288 N.W. 780 (1940).

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1025.7 BAILMENT: DUTY OF BAILEE UNDER A BAILMENT FOR MUTUAL BENEFIT

(Negligence: Defined, Wis JI-Civil 1005.)

A bailee for hire (in the absence of a contract to the contrary) owes a duty to exercise ordinary care with respect to the property which is the subject of the bailment. While a bailee for hire is not an insurer of the bailed property against loss, damage, or destruction, a bailee has the same duty to exercise ordinary care with respect to the property which an ordinary prudent person would exercise in the protection of his or her property from loss, damage, or destruction.

COMMENT

This instruction and comment were originally approved in 1974 and revised in 2009.

Firemen's Fund Ins. Co. v. Schreiber, 150 Wis. 42, 135 N.W. 507 (1912); Insurance Co. of North America v. Krieck Furriers, Inc., 36 Wis.2d 563, 568, 153 N.W.2d 532 (1967); Yao v. Chapman, 2005 WI App 200, 287 Wis.2d 445, 705 N.W.2d 272; Bushweiler v. Polk County Bank, 129 Wis.2d 357, 384 N.W.2d 717 (Ct. App. 1986); 8 C.J.S. 401, Bailments, 27 (Bailment for Mutual Benefit); 8 Am. Jur.2d 1092, Bailments § 206.

A presumption of negligence arises when the bailor establishes that the bailed property was damaged while in the possession of the bailee. The bailee then has the burden of going forward with evidence to show that he or she was not negligence. Hildebrand v. Carroll, 106 Wis. 324, 81 N.W. 1003 (1900); Milwaukee Mirror & Art Glass Works v. Chicago, M & St P Ry., 148 Wis. 173, 134 N.W. 379 (1912); Afflerbaugh v. Geo. Grede & Bro, 182 Wis. 217, 196 N.W. 224 (1923).

Where a bailment is solely for the benefit of the bailor, the bailee is only required to exercise a slight degree of care. Smith v. Poor Hand Maids of Jesus Christ, 193 Wis. 63, 213 N.W. 667 (1927).

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1025.8 BAILMENT: LIABILITY OF A GRATUITOUS BAILOR

(Defendant) is a gratuitous bailor in this case; i.e., (he) (she) lent (property involved) to (plaintiff or third person) without receiving or expecting to receive any compensation for the use of (property involved). As a gratuitous bailor, (plaintiff)'s only duty was to inform (borrower) of any defect of which (he) (she) is aware and which might make the use of the loaned property dangerous to the borrower.

COMMENT

This instruction was approved by the Committee in 1995 and reviewed in 2008. Editorial revisions were made to the comment in 2009.

There is no Wisconsin case on this issue. The instruction follows 8 Am. Jur. 2d Bailments, § 162, at 894-95; 46 A.L.R. 2d 404, 427, § 10; and 8 C.J.S. Bailments, § 44, at 275-76. A minority of jurisdictions impose liability on the bailor if he or she should or could have known of the defect in the exercise of reasonable care.

If the property loaned is inherently dangerous, the lender has a further duty to examine the property before lending it.

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1026 BAILMENT: NEGLIGENCE OF BAILEE MAY BE INFERRED

[Give first paragraph of Wis JI-Civil 1005, Negligence: Defined.]

It is the duty of a person having the possession of the property of another to exercise ordinary care to protect the property from damage.

The burden of proof is upon the owner of the property, in this case (plaintiff), to show that the property of (plaintiff) which (defendant) had in (his) (her) possession was damaged as a result of the negligence of (defendant). This means that (plaintiff) must prove that (plaintiff)'s property was received by (defendant) in an undamaged condition and that, during the period of time that (defendant) had the property in (his) (her) care, (defendant) had exclusive possession of the property, and also that the damage to the property would not ordinarily occur without someone's negligence. Proof of these facts is sufficient for you to infer that (defendant) was negligent as to the care of (plaintiff)'s property. In other words, when such a showing is made, the law permits, but does not require, you to infer that (defendant)'s negligence was a cause of plaintiff's damage. You will not make this inference, of course, if (defendant) has offered an explanation, satisfactory to you, of how the damage occurred without (his) (her) fault.

[Burden of Proof, Wis JI-Civil 200]

COMMENT

This instruction and comment were approved in 1977. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. Editorial changes were made in 2004.

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This instruction will not be used if the plaintiff is able to offer direct evidence of defendant's negligence.

The instruction proceeds on the theory that the elements indicated create a res ipsa case, rather than raise a presumption of defendant's negligence. The use of res ipsa in bailment cases was held proper in Arledge v. Scherer Freight Lines, Inc., 269 Wis. 142 68 N.W.2d 821 (1955), though on the facts of that case (fire occurring in bailee's premises) the res ipsa requirement of an accident of a kind which ordinarily does not occur in the absence of someone's negligence was held not satisfied.

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1026.5 BAILMENT: NEGLIGENCE OF CARRIER PRESUMED

There is no dispute that (goods) were delivered to (carrier) in good condition and were damaged while in (carrier)'s possession. The law provides that, from these facts, you may presume that the damage to the goods was due to the negligence of (carrier). But there is evidence in the case which may be believed by you that (carrier) was free from negligence (or that, notwithstanding its negligence, the negligence did not contribute to the damage). You must resolve the conflict. Unless (carrier) convinces you by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable that (carrier)was not negligent, you must find (carrier) negligent.

COMMENT

This instruction and comment were approved in 1974. Editorial changes were made in 2004.

14 Am. Jur.2d Carriers, § 620, p. 134; M. Capp Mfg. Co. v. Moland, 22 Wis.2d 424, 430, 126 N.W.2d 34 (1964); Mastercraft Paper Co. v. Consolidated Freightways, 55 Wis.2d 674, 680-81, 200 N.W.2d 596 (1972); L. L. Richards Mach. Co. v. McNamara Motor Express, 7 Wis.2d 613, 616, 97 N.W.2d 396 (1959).

Wis. Stat. § 407.301(4) provides: "The issuer [carrier] may by inserting in the bill the words 'shipper's weight, load and count' or other words of like purport indicate that the goods were loaded by the shipper; and if such statement is true the issuer [carrier] shall not be liable for damages caused by the improper loading. But their omission does not imply liability for such damages." See M. Capp Co. v. Moland, supra; Mastercraft Paper Co. v. Consolidated Freightways, supra.

"A notation or statement in a bill of lading that the goods were received by the carrier in apparent good order or condition makes a prima facie case, and the burden is then on the carrier to prove that they were not in good condition when received." 13 C.J.S. Carriers § 254(d) p. 538. "The presumption can be overridden if the carrier establishes the defect it claims existed was a hidden or concealed defect, . . . the burden is on the carrier to overcome the presumption." Allis-Chalmers Mfg. Co. v. Eagle Motor Lines, 55 Wis.2d 39, 46, 198 N.W.2d 162 (1972).

Damage caused by any carrier en route may be recovered from the delivering carrier, and the delivering carrier may recover, in turn, from the carrier on whose line the injury shall have been sustained.

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Carmack amendment to the Interstate Commerce Act, 49 U.S.C.A. § 20(11), (12); Rudy v. Chicago, M., St. P. & P. R.R., 5 Wis.2d 37, 42, 92 N.W.2d 367 (1958).

"The law imposes a duty of reasonable inspection on an intermediate railroad carrier with respect to employees of connecting carrier. . . . The duty of reasonable inspection imposed upon originating and intermediate carrier is 'to ascertain whether there is any fairly obvious defect in its construction or state of repair which constitutes a source of danger.'" Huck v. Chicago, St. P. M. & O. Ry., 16 Wis.2d 466, 470-71, 114 N.W.2d 811 (1962).

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1027 DUTY OF OWNER OF PLACE OF AMUSEMENT: COMMON LAW

This instruction was renumbered JI-8040 in 1985.

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1027.5 DUTY OF A PROPRIETOR OF A PLACE OF BUSINESS TO PROTECT A PATRON FROM INJURY CAUSED BY ACT OF THIS PERSON

This instruction was renumbered JI-8045 in 1986.

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1027.7 DUTY OF HOTEL INNKEEPER

This instruction was renumbered JI-8050 in 1986.

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1028 DUTY OF OWNER OF A BUILDING ABUTTING ON A PUBLIC HIGHWAY

This instruction was renumbered JI-8030 in 1986.

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1029 HIGHWAY OR SIDEWALK DEFECT OR INSUFFICIENCY

This instruction was renumbered JI-8035 in 1986.

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1030 RIGHT TO ASSUME DUE CARE BY HIGHWAY USERS

Every user of a highway has the right to assume that every other user of the highway will obey the rules of the road. However, a person cannot continue to make this assumption if the person becomes aware, or in the exercise of ordinary care ought to be aware, that another user of the highway, by his or her conduct, is creating a dangerous situation. Under such circumstances, a person using the highway must use ordinary care to avoid the danger.

COMMENT

This instruction was approved in 1974 and revised in 1985. The comment was reviewed without change in 1989. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

The instruction is taken from Kellogg v. Chicago & N.W. Ry., 26 Wis. 223, 233-34, 237-38 (1870); Langhoff v. Milwaukee & Pr. du Ch. R. Co., 19 Wis. 515 (1865). See also Dekeyser v. Milwaukee Automobile Ins. Co., 236 Wis. 419, 295 N.W. 755 (1941).

This instruction cannot be given unless the plaintiff made an assumption that the defendant would exercise due care. Geis v. Hirth, 32 Wis.2d 580, 592, 146 N.W.2d 459 (1966).

If a driver approaching a green light is exercising due care, he or she is entitled to rely upon the favorable signal light, until it becomes apparent to the driver that the driver approaching the red light is going to proceed in disregard of the light and the rules of the road. See Sabinasz v. Milwaukee & Suburban Transp. Corp., 71 Wis.2d 218, 238 N.W.2d 99 (1976). Teas v. Eisenlord, 215 Wis. 455, 461, 253 N.W. 795 (1934); Zindell v. Central Mut. Ins. Co., 222 Wis. 575, 580, 269 N.W. 327 (1936); Wilson v. Koch, 241 Wis. 594, 6 N.W.2d 659 (1942); and Wis JI-Civil 1191, Duty of Driver Entering Intersection with Green Light in His Favor: Lookout. See also Wis JI-Civil 1090, Driver on Arterial Approaching Intersection: Lookout; Right of Way; Flashing Yellow Signal.

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1031 CONDITIONAL PRIVILEGE OF AUTHORIZED EMERGENCY VEHICLE OPERATOR

Under some circumstances, the operator of an authorized emergency vehicle has a privilege to disregard rules governing the operation of other vehicles. This can include a privilege to (insert here the rule or rules of the road delineated in Wis. Stat. § 346.03(2) which the evidence show(s) (was) (were) disregarded, *e.g.*, exceed the posted speed limit.)

In this case, you should find (operator) was entitled to exercise the privilege if you find all of the following:

1. At the time of the accident, (operator) was operating an authorized emergency vehicle (responding to an emergency call) (in pursuit of an actual or suspected violator of the law) (responding to [but not returning from] a fire alarm). A (describe vehicle) is an authorized emergency vehicle.[1]

2. At the time of the accident, (operator) was:

• [*if § 346.03(2)(a) applies*: giving a visual signal by means of operating emergency lights.]

• [*if § 346.03(2)(b), (c), or (d) applies*: giving visual and audio signals by means of operating emergency lights and siren.[2]]

• [*if § 346.03(4) applies where the only rule violated is exceeding the speed limit*:

- obtaining evidence of a speed violation (or)
- responding to a call which (operator) reasonably believed involved a felony in progress and (operator) further reasonably believed (*choose one or more of the following*):

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- (knowledge of (operator) 's presence may have endangered the safety of a victim or other person)
- (knowledge of (operator) 's presence may have caused the suspected violator to evade apprehension)
- (knowledge of (operator)'s presence may have caused the suspected violator to destroy evidence of a suspected felony or may otherwise have resulted in the loss of evidence of a suspected felony)
- (knowledge of (operator)'s presence may have caused the suspected violator to cease the commission of a suspected felony before (operator) obtained sufficient evidence to establish grounds for arrest)].

3. (Operator) operated the authorized emergency vehicle with due care under the circumstances for the safety of all persons.[3]

If you are satisfied that these three conditions are met, you should find that (operator) was not negligent.

COMMENT

This instruction was approved in 2008 and reformatted in 2016. The notes were updated in 2016.

NOTES:

1. If there is a dispute as to whether the vehicle was an "authorized emergency vehicle," give instruction using one of the definitions in § 340.01(3).
2. The instruction uses the terms "emergency lights" and "siren" as the most common means of providing visual and audio signals. The instruction would have to be modified if other acceptable means of providing visual or audio signals, as described in § 346.03(3), are given.
3. See Legue v. City of Racine, 2014 WI 92, 357 Wis.2d 250, 849 N.W.2d 837; Estate of Cavanaugh v. Andrade, 202 Wis.2d 290, 319 (S. Ct. 1996) holds that governmental immunity will not protect the operator who fails to drive with due regard under the circumstances for the safety of others by virtue of § 346.03(5). § 346.03(5) further provides that the exemptions of § 346.03 do not "protect such operator from the consequences of his or her reckless disregard for the safety of others." Generally, any operator who operates with reckless disregard for the safety of others also violates a duty to drive with due regard for the safety of all persons.

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1032 DEFECTIVE CONDITION OF AUTOMOBILE: HOST'S LIABILITY

COMMENT

This comment was originally published in its present form in 1961. The comment was reviewed by the Committee without change in 1980 and 1989. Editorial changes were made in 1992 to address gender references in the comment. No substantive changes were made to the comment.

There is no single instruction that is usually used in a situation where a guest sues the host for damages arising out of a defective condition of the host's automobile. In order to present to the jury the various elements set forth in the rule of law, each element which may be in issue is best presented as a question in the special verdict. See Kowalke v. Farmers Mut. Auto Ins. Co., 3 Wis.2d 389, 88 N.W.2d 747 (1958), and Campbell v. Spaeth, 213 Wis. 162, 250 N.W. 394 (1933).

The presentation of the principles of law governing the fact situation under consideration, by means of instructions related to specific questions, in the special verdict removes the necessity of an instruction attempting to embody all the principles of law.

An automobile host may be held liable for injuries to a guest caused by a defective condition of the host's automobile, if the host knew of such defect and realized or should have realized that it involved an unreasonable risk to a guest, the defect was so concealed or hidden as to not be reasonably obvious to the guest, the defect and the risk involved were, in fact, unknown to the guest, and the host failed to warn the guest as to the defective condition and the risk involved therein. Campbell v. Spaeth, supra; Sweet v. Underwriters Casualty Co., 206 Wis. 447, 240 N.W. 199 (1932); Waters v. Markham, 204 Wis. 332, 339, 235 N.W. 797, 800 (1931); Poneitowcki v. Harres, 200 Wis. 504, 509, 228 N.W. 126 (1930); Sommerfield v. Flury, 198 Wis. 163, 168, 223 N.W. 408 (1929); O'Shea v. Lavoy, 175 Wis. 456, 186 N.W. 525 (1921).

The burden of proof is upon the guest to establish each and every element enumerated above. Jensen v. Jensen, 228 Wis. 77, 81, 279 N.W. 628, 630 (1938).

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1035 VOLUNTARY INTOXICATION: RELATION TO NEGLIGENCE

In answering the question(s) of the verdict relating to the negligence of any party, you are not to consider a person's drinking of intoxicants before the accident unless you determine that the intoxicants consumed affected the person to the extent that the person's ability to exercise ordinary care (in the operation of the vehicle) (and) (or) (for the person's own safety) was affected or impaired to an appreciable degree. A person who voluntarily consumes intoxicants must use the same degree of care in the operation of a vehicle or for his or her self-protection as one who has not consumed intoxicants.

COMMENT

This instruction and comment were approved in 1972 and revised in 1989 and 2003.

If blood texts are in evidence, see JI-Civil 1008.

This instruction should be given only when there is evidence permitting a reasonable inference that the drinking done by the driver or guest affected him or her to the extent stated.

In Landrey v. United Serv. Auto Ass'n, 49 Wis.2d 150, 158, 181 N.W.2d 407 (1970), the court stated the general rule on the relation between intoxication and negligence by quoting from 38 Am. Jur. Negligence § 36 as follows:

> Voluntary intoxication is not negligence per se. The law of negligence, however, does not put a premium upon voluntary drunkenness. From the standpoint of civil liability, the conduct of an intoxicated man is judged by the same standard as that applied to the conduct of a sober man. Ordinary care is not measured by what every prudent drunken man would do under like circumstances, but by what every prudent sober man would do under like circumstances.

Cases Relating to Driver: The Wisconsin Supreme Court has said that "it is negligence per se to operate a motor vehicle while under the influence of intoxicants." State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See also State v. Wolske, 143 Wis.2d 175, 182, 420 N.W.2d 60, 62 (Ct. App. 1988). Where it is not disputed that the intoxication caused the accident, then the trial judge can instruct that if the

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jury finds that the defendant's intoxicated state was a cause of the accident, it was negligence per se. Vonch v. American Standard Ins. Co., 151 Wis.2d 138, 442 N.W.2d 598 (Ct. App. 1989) (petition to review denied).

See also Landrey v. United Serv. Auto Ass'n, supra; Steffes v. Farmers Mut. Auto Ins. Co., 7 Wis.2d 321, 330, 96 N.W.2d 501, 507 (1959); Haag v. General Acc. Fire & Life Assur. Corp., 6 Wis.2d 432, 433-34, 95 N.W.2d 245, 247 (1959); Frey v. Dick, 273 Wis. 1, 9, 76 N.W.2d 716, 720 (1956).

Cases Relating to Guest: Watland v. Farmers Mut. Auto Ins. Co., 261 Wis. 477, 479-80, 53 N.W.2d 193, 194-95 (1952); Schubring v. Weggen, 234 Wis. 517, 521-22, 291 N.W. 788, 790 (1940).

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1045 DRIVER'S DUTY WHEN CHILDREN ARE PRESENT

Drivers of motor vehicles are chargeable with the knowledge that children of tender years do not possess the traits of mature deliberation, care, and caution of adults. The driver must increase vigilance if the driver knows, or in the exercise of ordinary care should know, that children are in, or are likely to come into, the driver's course of travel.

COMMENT

This instruction was approved by the Committee in 1963. The comment was updated in 1982 and was reviewed without change in 1989. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

This instruction is based on Hartzheim v. Smith, 238 Wis. 55, 59-60, 298 N.W. 196, 197 (1941); Hanes v. Hermsen, 205 Wis. 16, 17-19, 236 N.W. 646, 647-48 (1931); Ruka v. Zierer, 195 Wis. 285, 290-92, 218 N.W. 358, 360-61 (1928).

This instruction was quoted with approval in Holzem v. Mueller, 54 Wis.2d 388, 395, 195 N.W.2d 635 (1972), and Mack v. Decker, 24 Wis.2d 219, 230, 128 N.W.2d 455 (1964).

In Binsfeld v. Curran, 22 Wis.2d 610, 612, 126 N.W.2d 509 (1964), the court quoted Wis JI-Civil 1045 in full and made the following interpretation:

> This does not mean a driver of a motor vehicle is under a higher standard or degree of care approaching absolute liability but rather, when children are present or likely to come into his course of travel, he must exert greater effort in respect to lookout, speed, and management and control of his car to fulfil the duty of exercising ordinary care under such circumstances. As in any other case of negligence, the question is for the jury unless the facts are such as to compel a determination as a matter of law.

See also Burant v. Ortloff, 50 Wis.2d 223, 227, 184 N.W.2d 84 (1971).

Wis. Stat. § 891.44 creates a conclusive presumption that a child under seven cannot be contributorily negligent.

This instruction should not be given in the following situation: (1) Where the driver had no actual notice of the presence of children, and (2) Where there were no special situations, such as a school zone, park, or playground, etc., which should have alerted the driver to the possibility of the presence of children. Lisowski v. Milwaukee Auto Mut. Ins. Co., 17 Wis.2d 499, 502-03, 117 N.W.2d 666 (1962).

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1046 CONTRIBUTORY NEGLIGENCE OF PASSENGER: PLACING SELF IN POSITION OF DANGER

If before or upon entering an automobile, a passenger becomes aware of, or in the exercise of ordinary care ought to become aware of, a danger which involves a risk of injury to the passenger, it is then the passenger's duty to exercise ordinary care to take such action for his or her protection as would be taken by a person of ordinary intelligence and prudence under the same or similar circumstances.

COMMENT

This instruction and comment were approved in 1972. The comment was updated in 1985 and 1986 and was reviewed without change in 1989. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

Baird v. Cornelius, 12 Wis.2d 284, 107 N.W.2d 278 (1961). See also Delmore v. American Family Mut. Ins. Co., 118 Wis.2d 510, 348 N.W.2d 151 (1984).

Basically, a passenger's negligence can be of two types: passive and active. In Theisen v. Milwaukee Automobile Mut. Ins. Co., 18 Wis.2d 91, 105-06, 118 N.W.2d 140 (1962), Justice Hallows said that what is "active" and what is "passive" is a matter of causation. Thus, negligence which caused the collision is "active negligence." Negligence of the passenger which was only a cause of his or her own injuries is "passive negligence." Active negligence occurs where the passenger interferes with the safe operation of the car (e.g., grabbing the steering wheel) or where the passenger assumes some part of the driver's duties (e.g., coaching an inexperienced driver). The court noted in Delmore that "only in the exceptional case can a finding of active negligence (by a passenger) be appropriate." Passive negligence occurs when the passenger fails to use ordinary care for his or her own safety in entering a car or in riding in the car knowing of a hazard (e.g., condition of the car or driver, the driver's lack of skill, or any other hazard), or it may relate to lookout or failure to warn.

In Delmore, the court considered whether active negligence of the passenger would make the passenger liable for injuries to occupants of another car as well as to the driver of the passenger's car. After reviewing the progression of cases involving active/passive negligence, the court in Delmore concluded that a passenger who is actively negligent is liable to third parties including passengers in another vehicle. Conversely, passive negligence does not provide a basis of liability to third persons.

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1047 CONTRIBUTORY NEGLIGENCE OF GUEST: RIDING WITH HOST

A passenger in an automobile has no duty with reference to the manner in which the vehicle is momentarily managed. A passenger may assume that the driver understands and appreciates the control he or she has over the car and that the driver will not operate it in a negligent manner.

However, if the driver during operation of the vehicle subjects the passenger to an unreasonable risk of injury and the passenger knows, or, in the exercise of ordinary care, ought to know, that the passenger is being exposed to such danger, it then becomes the passenger's duty to use ordinary care for his or her own protection by (taking such action open to him or her) (making such protest) as a person of ordinary intelligence and prudence would (take) or (make) under the same or similar circumstances.

COMMENT

This instruction and comment were approved in 1972. The comment was updated in 1986 and was reviewed without change in 1989. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

This instruction can be used in two situations: (1) where the occupant did nothing, and it was claimed that some action was necessary; (2) where it is claimed that the occupant's action was inadequate.

Delmore v. American Family Mut. Ins. Co.. 118 Wis.2d 510, 348 N.W.2d 151 (1984). McConville v. State Farm Mut. Auto Ins. Co., 15 Wis.2d 374, 113 N.W.2d 14 (1962); Theisen v. Milwaukee Auto Mut. Ins. Co., 18 Wis.2d 91, 118 N.W.2d 140 (1962). See also, Comment, Wis JI-Civil 1046

Acquiescence to the other driver's behavior does not make the passenger a participant in an automobile race on a public highway. Mikaelian v. Woyak, 121 Wis.2d 581, 360 N.W.2d 706 (Ct. App. 1984).

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1047.1 NEGLIGENCE OF GUEST: ACTIVE: MANAGEMENT AND CONTROL

The management and control of a motor vehicle is the duty and responsibility of the driver alone. If a guest passenger, by physical action, interferes with the management and control of the driver, or if a guest passenger by any other action distracts the driver from the driver's duties of management and control, then the guest passenger is negligent as that word previously has been defined for you.

COMMENT

This instruction and comment were approved in 1974. The comment was updated in 1985 and was reviewed without change in 1989. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

Delmore v. American Family Mut. Ins. Co., 118 Wis.2d 510, 348 N.W.2d 151 (1984); Theisen v. Milwaukee Auto Mut. Ins. Co., 18 Wis.2d 91, 119 N.W.2d 393 (1962); Dutcher v. Phoenix Ins. Co., 37 Wis.2d 591, 155 N.W.2d 609 (1968).

Active negligence, such as grabbing the steering wheel, Dutcher v. Phoenix Ins. Co., supra, must be distinguished from passive negligence, such as accompanying an intoxicated or incompetent driver, McConville v. State Farm Mut. Ins. Co., 15 Wis.2d 374, 113 N.W.2d 14 (1962); negligence of a guest with respect to lookout, Romberg v. Nelson, 8 Wis.2d 174, 98 N.W.2d 379 (1959); and negligence with respect to a guest's duty to warn, Teas v. Eisenlord, 215 Wis. 455, 253 N.W. 795 (1934).

See also Wis JI-Civil 1075, Lookout: Guest.

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1048 DRIVER, NEGLIGENCE: HIGHWAY DEFECT OR INSUFFICIENCY

An operator of a vehicle has the duty to exercise ordinary care to observe the roadway and its immediate surroundings to discover any dangerous condition or defect that would be discoverable by an ordinarily prudent operator under like or similar circumstances.

The exercise of such care requires the efficient use of one's eyes, faculties, and opportunities for observation that an ordinary prudent person would use under like circumstances in order to become aware of the dangers naturally incident to the situation or to see unsafe conditions that are in plain sight.

While an operator has a right to assume that a highway is reasonably safe, upon being timely made aware of a dangerous condition or defect, an operator then has the duty to exercise ordinary care to reduce speed, stop, change course, or take such other means as would be taken by an ordinarily prudent operator under the same or similar circumstances to avoid the dangerous condition or defect and avoid injury or damage.

COMMENT

This instruction and comment were approved in 1974. The comment was reviewed without change in 1989. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

As to the third paragraph, see Wall v. The Town of Highland, 72 Wis. 435, 438,30N.W. 560 (1888).

Also see Mondl v. F.W. Woolworth, 12 Wis.2d 571, 107 N.W.2d 472(1961); Hamus v. Weber, 199 Wis. 320, 226 N.W. 392 (1929).

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1049 PEDESTRIAN, NEGLIGENCE: SIDEWALK DEFECT OR INSUFFICIENCY

A pedestrian has a duty to exercise ordinary care to observe the sidewalk (roadway) and its immediate surroundings to discover any dangerous condition or defect that would be discoverable by an ordinarily prudent pedestrian under like or similar circumstances.

The exercise of such care requires the efficient use of one's eyes, faculties, and opportunities for observation that an ordinarily prudent person would use under like circumstances in order to become aware of the dangers naturally incident to the situation or to see unsafe conditions that are in plain sight.

COMMENT

This instruction was approved in 1974. The comment was reviewed without change in 1989.

Wis. Stat. §§ 81.15, 66.615. LeMay v. Oconto, 229 Wis. 65, 281 N.W. 688 (1938), held that Wis. Stat. § 81.15 applies to defects of sidewalks, as well as roads and streets.

See, generally, Hales v. Wauwatosa, 275 Wis. 445, 82 N.W.2d 301 (1957); Paulson v. Madison Newspapers, 274 Wis. 355, 80 N.W.2d 421 (1957); Pumorlo v. Merrill, 125 Wis. 102, 103 N.W. 464 (1905); Hoffman v. North Milwaukee, 118 Wis. 278, 95 N.W. 274 (1903).

Knowledge of the defect does not conclusively establish contributory negligence. Hales v. Wauwatosa, supra; Zoellner v. Fond du Lac, 147 Wis. 300, 133 N.W. 35 (1911).

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1050 DUTY OF PERSONS WITH PHYSICAL DISABILITY

(Plaintiff) (Defendant) has a (visual) (hearing) (physical) disability. The extent of the disability is for you to determine from the evidence. A person with such a disability has the same right as others not having this disability to (use the streets and sidewalks) (operate a motor vehicle). (Plaintiff) (Defendant) is required as others are to use ordinary care in doing so. There is no difference in the standard of care for one who has a disability than for one who has not. Ordinary care requires that a person with a disability compensate for (his) (her) disability as necessary under the circumstances to use ordinary care.

COMMENT

This instruction and comment were approved in 1974. The instruction was revised in 1997. The comment was reviewed without change in 1997. Editorial changes were made in 1992 to address gender references in the instruction.

Before an instruction on the duty of a handicapped person is given, there must be evidence of a relationship between the handicap and some element of negligence. Lisowski v. Milwaukee Auto Ins. Co., 17 Wis.2d 499, 117 N.W.2d 666 (1962).

This instruction has been approved for use where a person with a sensory handicap is charged with negligence which resulted in injury to another. Merkley v. Schramm, 31 Wis.2d 134, 142 N.W.2d 173 (1966).

See also Davis v. Feinstein, 370 Pa. 449, 88 Atl.2d 659 (1952); Hanson v. Matas, 212 Wis. 275, 282-83, 249 N.W. 505 (1933); Short Way Lines v. Sutton's Adm'r, 291 Ky. 541, 552, 164 S.W.2d 809 (1942); Keith v. Worcester & D. V. St. R.R., 196 Mass. 478, 482-83, 82 N.E. 680 (1907); Smith v. Sneller, 245 Pa. 68, 72, 26 Atl.2d 452 (1942). 38 Am. Jur. Negligence § 210 (1941).

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1051 DUTY OF WORKER: PREOCCUPATION IN WORK MINIMIZES DUTY

Momentary diversion of attention or preoccupation of a worker in the performance of work minimizes or reduces the degree of care that would otherwise be required of him or her; nevertheless, a worker has the duty to use the same degree of care for his or her safety that an ordinarily prudent worker would use under such conditions (when preoccupied with work) (when his or her attention was momentarily diverted by work).

COMMENT

The instruction and comment were initially approved by the Committee in 1974. The instruction was revised in 1987 and reviewed without change in 1989. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction. The comment was updated in 1995.

Bourassa v. Gateway Erectors, Inc., 54 Wis.2d 176, 194 N.W.2d 602 (1973); Criswell v. Seaman Body Corp., 233 Wis. 606, 620, 290 N.W. 177 (1940); Patterson v. Edgerton Sand & Gravel Co., 227 Wis. 11, 277 N.W. 636 (1938); Neitzke v. Kraft-Phenix Dairies, Inc., 214 Wis. 441, 253 N.W. 579 (1934); Sandeen v. Willow River Power Co., 214 Wis. 166, 252 N.W. 706 (1934); Hodgson v. Wisconsin Gas & Light Co., 188 Wis. 341, 206 N.W. 191 (1925). See also Prill v. Hampton, 154 Wis.2d 667, 453 N.W.2d 909 (Ct. App. 1990); Parlee, "Preoccupation with Work Defense to Contributory Negligence," Wisconsin Lawyer, May, 1995 at 24-26.

To justify use of this instruction, there must be evidence of a particular and immediate hazard that was unknown to one who was preoccupied with or momentarily diverted by work. Walsh v. Wild Masonry Co., 72 Wis.2d 447, 454, 241 N.W.2d 416, 419 (1976); Suhaysik v. Milwaukee Cheese Co., 132 Wis.2d 289, 295-96, 392 N.W.2d 98 (1986).

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1051.2 DUTY OF WORKER: WHEN REQUIRED TO WORK IN UNSAFE PREMISES

When a worker by direction of his or her employer is required to work on an unsafe premises in carrying out his or her employment, you must consider the reasonableness of the employee exposing himself or herself to the particular risk. The reasonableness of the worker's conduct is to be determined in the light of the utility of going to work at the designated place of employment, and performing work in the usual manner, even though there was a possibility that the premises might be unsafe. In such situations, a worker has a duty to exercise the same degree of care for his or her own safety that an ordinarily prudent worker would exercise under the same or similar conditions.

COMMENT

This instruction and comment were approved in 1977. The comment was reviewed without change in 1989. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

"In determining the contributory negligence of an employee who nevertheless proceeds to work in an unsafe place, a special factor is injected, i.e., the reasonableness of the employee exposing himself to the particular risk, the test being whether he was contributorily negligent, determined in the light of the utility of going to work at his usual place of employment, and performing work in the usual manner, even though there was a possibility that the premises might be unsafe." McCrossen v. Nekoosa Edwards Paper Co., 59 Wis.2d 245, 246, 208 N.W.2d 148 (1973).

Commenting on Meyer v. Val-Lo-Will Farms, 14 Wis.2d 616, 111 N.W.2d 500 (1961), the court stated ". . . whether the conduct of an injured person constituted contributory negligence was affected by the fact that the person attempted to be so charged was a workman at his place of employment. . . 'This fact may bear upon the reasonableness of their exposing themselves to the particular risk' [Meyer, at page 622] . . . [This case] by implication indicated that, when a jury is called upon to determine the contributory negligence of an employee who nevertheless proceeds to work in an unsafe place, that was a fact which the jury should consider." [McCrossen, at pages 255-56]

"[I]n a safe-place action, . . . the employee's contributory negligence is less when his act or omission has been committed in connection with the performance of his duties. . . [I]t may be more reasonable to assume certain risks in the employment situation than in other situations. Conduct constitutes negligence if the risk of harm involved is of such magnitude as to outweigh what the law

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regards as the utility of the act or the manner in which it is done." Young v. Anaconda Am Brass Co., 43 Wis.2d 36, 46, 47, 168 N.W.2d 112 (1969).

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1052 EQUIPMENT AND MAINTENANCE OF VEHICLES: GENERAL DUTY

(An owner) (A driver) of a motor vehicle has the duty to use ordinary care to discover any unsafe or defective condition of the vehicle and to have the vehicle in a reasonably safe condition for operation upon a public highway.

The vehicle should be (equipped) (and) (maintained) to make it reasonably safe and suitable for the particular kind of use for which it is to be employed so that the driver can control it to prevent its becoming a hazard to its occupants or other users of the highway.

The failure to use ordinary care to discover an unsafe condition, to equip the vehicle properly, or to maintain it is negligence.

However, if a defective condition which renders a vehicle unsafe was not known and would not have been discovered by the use of ordinary care, the (owner) (driver) is not negligent in (permitting it to be operated) (operating it) in the defective condition.

COMMENT

This instruction and comment were approved in 1974. The instruction was updated in 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle as well as an owner. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

Capello v. Janeczko, 47 Wis.2d 76, 85, 176 N.W.2d 395 (1970). As to the last paragraph, see Walk v. Boudheim, 223 Wis. 514, 271 N.W. 27 (1937). 60A C.J.S. Motor Vehicles § 260 (1969).

This instruction, paraphrased to some extent, may be appropriate where an unknown mechanical defect causes a hazard and the question of management and control arises between the time of the mechanical failure and the accident. See Kowalke v. Farmers Mut. Auto Ins. Co., 3 Wis.2d 389, 88 N.W.2d 747 (1958), and Byerly v. Thorpe, 221 Wis. 28, 265 N.W. 76 (1936). The Byerly case has been overruled in part by Foellmi v. Smith, 15 Wis.2d 274, 112 N.W.2d 712 (1961).

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Wis. Stat. Ch. 347, Equipment of Vehicles, consists mainly of safety statutes, the violation of which constitutes negligence. Many sections of the chapter require specific equipment for various types of vehicles under defined conditions. Some sections require certain standards of maintenance and manner of use of specified equipment; others contain general exceptions to the rules stated. See the table of sections at the beginning of chapter 347.

Wis JI-Civil 1053 and 1054 do not attempt to set forth the provisions of each statute but are designed to provide forms that can be altered to accommodate the various statutory provisions relating to equipment.

Before an instruction is given, it is suggested that the statute be checked as to the date of its application and any statutory exemptions that may exist. See Wis. Stat. § 347.02.

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1053 EQUIPMENT AND MAINTENANCE OF VEHICLES: HEADLIGHTS

The Wisconsin statutes provide that:

[Use the appropriate following paragraph(s).]

(a) Every motor vehicle shall be equipped with at least two headlights. The headlights shall be mounted on the front of the vehicle at a height of not more than 54 inches nor less than 24 inches from the ground.

(b) The headlights must be multiple beam lights; the upper beam from both lights, aimed straight ahead, must be of such intensity to reveal persons and vehicles at a distance of at least 350 feet ahead, under normal atmospheric conditions, upon a straight and level unlighted highway, and under all conditions of loading. The lowermost beam from both lights must be of sufficient intensity to reveal persons and vehicles at a distance of at least 100 feet ahead under the same conditions.

(c) No person shall drive a vehicle upon a highway during hours of darkness unless all headlights, required by the statute, are lighted. "Hours of darkness" is that period of time from one-half hour after sunset to one-half hour before sunrise (and all other times when there is not sufficient natural light to render clearly visible any person or vehicle upon a highway at a distance of 500 feet).

(d) The driver of a vehicle shall keep all required headlights reasonably clean and in proper working condition at all times.

(e) Whenever a motor vehicle is being driven on a highway during hours of darkness, the driver shall use a beam directed high enough and of sufficient intensity to reveal a person or vehicle at a safe distance ahead except that the driver, when approaching

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an oncoming vehicle within 500 feet, shall dim, depress, or tilt the vehicle's headlights so that the glaring rays are not directed into the eyes of the driver of the other vehicle.

(f) Whenever the driver of a vehicle equipped with multiple beam headlights approaches or follows another vehicle within 500 feet to the rear, the driver shall dim, depress, or tilt headlights on the vehicle so that the glaring rays are not reflected into the eyes of the driver of the other vehicle.

A failure to comply with any of these statutes is negligence.

COMMENT

The instruction and comment were originally published in 1962. The instruction was updated in 2008. The comment was updated in 1980 and reviewed without change in 1997. Editorial changes were made in 1992 to address gender references in the instruction.

This instruction attempts to set forth the statutory requirements as to condition of headlights and the use of them for the ordinary passenger vehicle, under usual conditions. All of the requirements set forth above are not usually at issue in a given case. Therefore, the inappropriate paragraphs or parts of paragraphs should be stricken.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

The substance of paragraph (a) is from Wis. Stat. §§ 347.08, 347.09; paragraph (b) from § 347.10; paragraph (c) from §§ 347.06, 340.01(23); paragraph (d) from § 347.06(3); paragraph (e) from § 347.12(1)(a); paragraph (f) from § 347.12(1)(b).

If a vehicle is not operated in excess of 20 miles per hour at any time, headlights need only reveal persons or objects 75 feet ahead. Wis. Stat. § 347.10(4).

Different equipment is required or permissible for vehicles also equipped with adverse weather lamps, § 347.07; motorcycles or motor bicycles, §§ 347.09, 347.11; trucks or vehicles over 80 inches in width, § 347.16; highway maintenance vehicles, § 347.23; nonmotor vehicles, § 347.24; emergency vehicles and school buses, § 347.25. Also see provisions as to optional lighting equipment, § 347.26, and parked vehicles, § 347.27. When such other types of vehicles are in the case, the appropriate statute as to equipment and its use should be substituted or added.

In cases involving specialized commercial vehicles, orders of the Department of Transportation may have application to the issues.

In Zartner v. Scopp, 28 Wis.2d 205, 212, 137 N.W.2d 107 (1965), the court noted that the lighting of headlights has a warning function for approaching cars in addition to affording the driver greater visibility.

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1054 EQUIPMENT AND MAINTENANCE OF VEHICLES: BRAKES

Subdivision ___ of question ___ asks whether (driver) was negligent with respect to the (condition of the brakes on (his) (her) vehicle) (mechanical condition of (his) (her) vehicle).

The Wisconsin statutes provide that:

[Use the appropriate paragraph(s).]

(a) No person shall drive a motor vehicle upon a highway unless the motor vehicle is equipped with brakes adequate to control the movement of and to stop and hold the vehicle. The brakes must be capable of bringing the vehicle to a stop under normal conditions within 50 feet when traveling at a speed of 20 miles per hour.

(b) There shall be two separate means of applying the brakes, each of which means shall be effective to apply the brakes to at least two wheels. If these two separate means of applying the brakes are connected in any way, they shall be so constructed that failure of any one part of the operating mechanism will not leave the motor vehicle without operative brakes. One of the means of braking operation shall consist of a mechanical connection from the operating lever of the brake shoe or bands and this brake shall be capable of holding the vehicle on any grade on which it is driven, under all conditions of loading on a surface free from snow, ice, or loose material.

(c) The brakes shall be maintained in good working order at all times when the vehicle is used upon a public highway.

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If you are satisfied that the brakes on the vehicle driven by (driver) at the time of the collision did not comply with these statutory requirements, the (driver) was negligent.

[Burden of Proof, Wis JI-Civil 200]

COMMENT

This instruction and comment were approved in 1974. This instruction was revised in 2002 and 2008.

Wis. Stat. §§ 347.35 and 347.36.

Parts of the instruction that are not within the issues or proof should be stricken.

Where there is evidence of defective brakes, use of this instruction, rather than Wis JI-Civil 1052, Equipment and Maintenance of Vehicles: General Duty, is preferable. Capello v. Janeczko, 47 Wis.2d 76, 176 N.W.2d 395 (1970).

If there is an issue as to brake failure because of a faulty condition not known or discoverable by ordinary care, use paragraph 4 of Wis JI-Civil 1052, as a supplement to this instruction. See Walk v. Boudheim, 223 Wis. 514, 271 N.W. 27 (1937); 1955 Wis. L. Rev. 19.

Different statutory regulations apply to motor driven cycles, trailers, semitrailers, and towed vehicles. Wis. Stat. § 347.35(2) and (3).

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1055 LOOKOUT

A driver must use ordinary care to keep a careful lookout ahead and about him or her for the presence or movement of other vehicles, objects, or pedestrians that may be within or approaching the driver's course of travel. In addition, the driver has the duty [to use ordinary care] to lookout for the condition of the highway ahead and for traffic signs, markers, obstructions to vision, and other things that might warn of possible danger. The failure to use ordinary care to keep a careful lookout is negligence.

To satisfy this duty of lookout, the driver must use ordinary care to make observations from a point where the driver's observations would be effective to avoid the accident. Additionally, having made the observation, the driver must then exercise reasonable judgment in calculating the position or movement of persons, vehicles, or other objects.

[When approaching an intersection where a marked or unmarked crosswalk for pedestrians exists, the driver must maintain such a lookout as is reasonably necessary to avoid striking them (and to yield the right of way to pedestrians when they have the statutory right of way).]

[When hazards exist because of highway conditions, volume of traffic, obstructions to view, weather, visibility, or other conditions, care must be exercised consistent with the hazards.]

COMMENT

This instruction was initially approved in 1962. The instruction and comment were revised by the Committee in 1982, 1984, and 1997. The comment was updated in 1989. Editorial changes were made in 1992 to address gender references in the instruction.

Brown v. Travelers Indem. Co., 251 Wis. 188, 192, 28 N.W.2d 306 (1947); Hafemann v. Milwaukee Auto Ins. Co., 253 Wis. 540, 546, 34 N.W.2d 809, 812 (1948); Thieme v. Weyker, 205 Wis. 578, 580, 238 N.W.

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389 (1931); Cunnien v. Superior Iron Works Co., 175 Wis. 172, 176, 184 N.W. 767 (1921). See also Westfall v. Kottke, 110 Wis.2d 86, 328 N.W.2d 481 (1983). Where the alleged negligent lookout involves lookout to the rear, see Wis JI-Civil 1114 and 1355.

The duty of lookout has two aspects: namely, a duty of observation and a corollary duty to exercise reasonable judgment in calculating the position and movement of other persons, vehicles, and other objects. This dual aspect of the duty of lookout has been collectively referred to as "the requirement of efficient lookout." Gleason v. Gillihan, 32 Wis.2d 50, 55, 145 N.W.2d 90 (1966).

The requirement of efficient lookout was applied in Plog v. Zolper, 1 Wis.2d 517, 527, 85 N.W.2d 492 (1957), wherein the court stated:

> Failure to properly evaluate what is seen is as much an element of lookout as not seeing the approaching vehicle at all.

Although the law does give the driver on a through highway a preference, the driver still has a duty of lookout. In Leckwee v. Gibson, 90 Wis.2d 275, 287, 280 N.W.2d 186 (1979), the court said:

> The operator of an automobile having the right of way on an arterial highway must still maintain a proper lookout. Having the right of way does not relieve one of the duty of watching the road for vehicles on the highway or entering thereon. (Citing Puhl v. Milwaukee Auto Ins. Co., 8 Wis.2d 343, 348, 99 N.W.2d 163 (1959).)

See also Liles v. Employers Mut. Ins. of Wausau, 126 Wis.2d 492, 377 N.W.2d 214 (Ct. App. 1985).

The failure of a driver who does not see or become aware of danger in time to take effective steps to avoid an accident is negligent as to lookout, not management and control. Leckwee v. Gibson, supra at 291 n.7.

The claim of an existing emergency to negative acts of alleged negligence does not apply when the negligent conduct complained of is negligent lookout. Schmiedeck v. Gerard, 42 Wis.2d 135, 140, 166 N.W.2d 136 (1969).

The duty of lookout extends beyond the confines of the roadway being traveled. See Reshan v. Harvey, 63 Wis.2d 524, 530, 217 N.W.2d 302 (1974).

Wis. Stat. § 346.88 prohibits the obstruction of the driver's view by activities within the car or by covering of the glass.

The last two paragraphs can be added when facts presented at trial warrant their addition.

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1056 LOOKOUT: CAMOUFLAGE

A person who [claims to have] exercised ordinary care in maintaining a lookout, but nevertheless failed to see an object is not negligent because of failure to see the object if the object is not seen because at least one of the factors of recognition (color, shape, texture, movement, position, or shadow) was not present causing the object to blend with its background.

You must decide whether the factor(s) of recognition claimed to be absent provide(s) a valid explanation for (party) who claims to have exercised ordinary care in maintaining lookout but, nevertheless, failed to see the object.

COMMENT

The instruction and comment were originally published in 1963. The instruction was revised in 1997 and 2003. A spelling error was corrected in 2012. The comment was updated in 1980 and 1987 and was reviewed without change in 1989 and 2003.

This instruction is to be used in a case where there is no evidence of negligence as to speed.

Zoellner v. Kaiser, 237 Wis. 299, 296 N.W. 611 (1941); Pickett v. Travelers Indem. Co., 283 F.2d 837 (7th Cir. 1960); Gilberg v. Tisdale, 13 Wis.2d 249, 108 N.W.2d 515 (1961).

Although the camouflage instruction is typically involved only in cases involving nighttime motor vehicle accidents, "the instruction is proper anytime the party is accused of failure to see an object in plain sight, as long as there is adequate testimony excusing the failure on the ground that the object blends with its surroundings." Callan v. Peters Constr. Co., 94 Wis.2d 225, 236, 288 N.W.2d 146 (Ct. App. 1979). See also Suhaysik v. Milwaukee Cheese Co., 132 Wis.2d 289, 296-97, 392 N.W.2d 98 (Ct. App. 1986).

In Callan, the court defined six factors of recognition which influence perception of objects by the eye. The factors are:

1. Color
2. Shape
3. Texture
4. Movement
5. Position
6. Shadow

The court applied these factors to the law of camouflage in Wisconsin, stating:

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Applying the factors of recognition to the law of camouflage in Wisconsin, we hold that a person who claims to have exercised ordinary care in maintaining a lookout, but nevertheless failed to see an object in plain sight, is not negligent because of failure to see an object in plain sight if the object is not seen because at least one of the factors of recognition was not present thereby causing the object to blend with its background, obscuring its presence and diminishing the reasonable prospect of its perception.

Obviously, the nighttime will present the most usual case for camouflage since factors of recognition are more apt to be absent than during the daytime. We cannot, however, restrict the camouflage instruction to the nighttime since we are convinced that at least one factor of recognition could be missing during a daytime observation, thereby causing a camouflage effect.

We further hold that it is a jury question whether the factors of recognition claimed to be absent provide a valid explanation for a person who professes to have exercised ordinary care in maintaining lookout but, nevertheless, failed to see an object in plain sight. 94 Wis.2d at 240.

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1060 LOOKOUT: BACKING

[Insert appropriate paragraphs of Wis JI-Civil 1055, Lookout.]

A safety statute provides that the driver of a vehicle shall not back the vehicle unless the movement can be made with reasonable safety.

To comply with this statute, a driver must, before he or she backs the vehicle, use ordinary care to keep a careful lookout for the presence and location of other vehicles, objects, or pedestrians that may be approaching or within the driver's course of travel. In addition, the driver must exercise reasonable judgment in calculating the time required to reach a proper position on the highway (and the distance and speed of any vehicle seen by the driver to be approaching the driver's course of travel).

COMMENT

The instruction and comment were originally published in 1960. The instruction was revised in 2008. The comment was updated in 1980 and 2008.

Wis. Stat. § 346.87.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

As to calculation as a part of lookout, see Plog v. Zolper, 1 Wis.2d 517, 527, 85 N.W.2d 492, 498 (1957); Gleason v. Gillihan, 32 Wis.2d 50, 145 N.W.2d 90 (1966); Ogle v. Avina, 33 Wis.2d 125, 146 N.W.2d 422 (1966); Slattery v. Lofy, 45 Wis.2d 155, 172 N.W.2d 341 (1969).

In Slattery v. Lofy, supra, the court stated:

> The rule that a driver before entering an arterial highway must not only exercise a proper lookout but also must make a reasonable judgment or calculation as to the time it will take to enter and reach a proper position on the highway was inapplicable where the evidence established that the overtaking driver had reached a proper place on the highway more than 400 feet beyond the point he had entered. 45 Wis.2d at 159.

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1065 LOOKOUT: ENTERING OR CROSSING A THROUGH HIGHWAY

Because the law gives a preference to traffic on a through highway, a driver (entering upon) (crossing) a through highway as (name) was, with respect to lookout, has the duty to look sufficient distances to determine that a vehicle approaching on the through highway cannot reasonably be expected to interfere with the driver's (entering upon and taking a proper position on the through highway) (entering upon and turning left onto the through highway) (crossing the through highway) before the driver proceeds to do so.

In addition, the driver must use reasonable judgment in calculating the time required for (him) (her) to (enter and reach a proper position on the through highway) (cross the through highway) as well as the distance away and speed of any vehicle seen by (him) (her) to be approaching on the through highway. If the driver fails to use such reasonable judgment, the driver is negligent as to lookout.

COMMENT

This instruction was approved by the Committee in 1960 and revised in 2002.

This instruction, if used, should follow the first two paragraphs of Wis JI-Civil 1055, Lookout. The last clause relating to reasonable judgment in calculating the comparative distances and speeds of the two cars is based on Plog v. Zolper, 1 Wis.2d 517, 527, 85 N.W.2d 492, 498-99 (1957), where the court said, in reference to a driver entering a through highway from a private driveway, that "failure to properly evaluate what is seen is as much an element of lookout as not seeing the approaching vehicle at all." ThePlog case was followed in Slattery v. Lofy, 45 Wis.2d 155, 159, 172 N.W.2d 341 (1969); Lundquist v. Western Casualty & Sur. Co., 30 Wis.2d 159, 163, 140 N.W.2d 241 (1965); Henschel v. Rural Mut. Casualty Ins. Co., 3 Wis.2d 34, 38, 87 N.W.2d 800, 802 (1958), and in Bowers v. Treuthardt, 5 Wis.2d 271, 275, 92 N.W.2d 878, 881 (1958).

The law does give the driver on a through highway a preference; however, it is not absolute. Leckwee v. Gibson, 90 Wis.2d 275, 286, 280 N.W.2d 186 (1979). The operator of the vehicle having the

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right of way on the arterial must still maintain a proper lookout. Leckwee, supra; Schmiedeck v. Gerard, 42 Wis.2d 135, 139, 166 N.W.2d 136 (1969).

A driver, who stops at an intersection and finds his vision obstructed, must move into a position where he can efficiently observe traffic crossing his path, stop again, and make an effective observation in either direction. Failure to exercise this caution constitutes negligent lookout. Bey v. Transport Indem. Co., 23 Wis.2d 182, 127 N.W.2d 251 (1964).

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1070 LOOKOUT: FAILURE TO SEE OBJECT IN PLAIN SIGHT

A person who has the duty of keeping a lookout must look with such attention and care as to see what is in plain sight. [If a person looks and does not see what is in plain sight, the person did not keep a proper lookout, and the person is just as negligent as if the person did not look at all.]

[The duty to look means to look efficiently. A person who looks and fails to see what is in plain sight is in precisely the position he or she would be in if he or she did not look at all.]

COMMENT

The instruction and comment were originally published in 1960 and revised in 1984. The comment was reviewed without change in 1989. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

Weber v. Mayer, 266 Wis. 241, 255-56, 63 N.W.2d 318, 325-26 (1954); Lind v. Lund, 266 Wis. 232, 236, 63 N.W.2d 313, 315 (1954); Lake to Lake Dairy Coop. v. Andrews, 264 Wis. 170, 173, 58 N.W.2d 685 (1953); Pettera v. Collins, 203 Wis. 81, 83, 233 N.W. 545, 546 (1930); Mertens v. Lake Shore Yellow Cab & Transfer Co., 195 Wis. 646, 648, 218 N.W. 85 (1928); Grutzner v. Kruse, 87 Wis.2d 38, 41, 273 N.W.2d 373 (Ct. App. 1978).

This instruction is used, as the subtitle indicates, where the evidence shows that a party failed to see what was in plain sight. Westfall v. Kottke, 110 Wis.2d 86, 110, 328 N.W.2d 481 (1983).

In Leckwee v. Gibson, 90 Wis.2d 275, 290, 280 N.W.2d 186 (1979), the court stated with respect to lookout:

> The duty to look means to look efficiently. Gibson was negligent as to lookout in failing to see the vehicle approaching the intersection which he was attempting to enter and has concealed that fact. . . . A driver approaching a through highway on a nonarterial street must not only physically stop his car for the arterial, he also has the duty not to proceed into the intersection until it is safe to do so.

See Schmidt v. Jansen, 247 Wis. 648, 20 N.W.2d 542 (1945); Kraskey v. Johnson, 266 Wis. 201, 63 N.W.2d 112 (1954); Magin v. Bemis, 17 Wis.2d 192, 199, 116 N.W.2d 129 (1962); and Schlueter v. Grady, 20 Wis.2d 546, 555, 123 N.W.2d 458 (1963).

Looking and not seeing what is in plain sight is as negligent with respect to lookout as not seeing at all. Westfall v. Kottke, supra at 110. Grutzner v. Kruse, supra.

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1075 LOOKOUT: GUEST

A guest (passenger) in an automobile has a duty to exercise ordinary care for his or her own safety. This duty requires a guest to exercise ordinary care in maintaining a proper lookout to warn the driver of any danger of which the guest has reason to believe the driver may not be aware.

A guest (passenger), however, is not bound to maintain the same degree of diligence in keeping a lookout as is required of the driver of the car, because a passenger does not have the responsibility of operating and controlling the automobile. However, the fact that the passenger is not in charge of operating the automobile does not relieve the passenger from all duty to use care for his or her own safety. The passenger's duty with respect to lookout is to exercise that care and caution which a person of ordinary intelligence, care, and prudence would use while riding in the same passenger seat of the automobile as the plaintiff and under the same or similar circumstances as exist in this case.

COMMENT

The instruction and comment were revised by the Committee in 1982. The comment was reviewed without change in 1989. Editorial changes were made in 1992 to address gender references in the instruction. An editorial correction was made in 1996.

Theisen v. Milwaukee Auto Mut. Ins. Co., 18 Wis.2d 91, 118 N.W.2d 140, 119 N.W.2d 393 (1962); Davis v. Allstate Ins. Co., 55 Wis.2d 56, 197 N.W.2d 734 (1972); Sulkowski v. Schaefer, 31 Wis.2d 600, 143 N.W.2d 120 (1966); Baker v. Herman Mut. Ins. Co., 17 Wis.2d 597, 606, 117 N.W.2d 725 (1962).

Romberg v. Nelson, 8 Wis.2d 174, 178, 98 N.W.2d 379, 381 (1959), quoting from Vandenack v. Crosby, 275 Wis. 421, 434, 82 N.W.2d 307, 313 (1957), and Tomberlin v. Chicago, St. P., M. & O. Ry., 208 Wis. 30, 33, 243 N.W. 208 (1932), recognizes that the duty of the passenger as to lookout is not the same as the duty upon the driver and that the negligence of the passenger depends upon the circumstances of each case and hence is generally a jury question.

Teas v. Eisenlord, 215 Wis. 455, 460, 253 N.W. 795, 797 (1934), states that if a guest saw or should have seen danger and it was apparent to the guest that the driver intended to do nothing to avoid danger,

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the guest has an absolute duty to warn. See also St. Paul Fire & Marine Ins. Co. v. Burchard, 25 Wis.2d 288, 294, 130 N.W.2d 866 (1964).

A passenger has a right to assume that a driver will obey a stop sign. Lewis v. Leiterman, 4 Wis.2d 592, 597, 91 N.W.2d 89, 92 (1958). Also see Le Mere v. Le Mere, 6 Wis.2d 58, 61, 94 N.W.2d 166, 168 (1959).

Goehmann v. National Biscuit Co., 204 Wis. 427, 430, 235 N.W. 792, 793 (1931), states that a guest has no duty with reference to the momentary management and control of the car by the driver. Lampertius v. Chmielewski, 6 Wis.2d 555, 559, 95 N.W.2d 435, 436-37 (1959), quoting from Vandenack v. Crosby, supra, points out that a guest is held to a lesser degree of care than a driver and a back seat guest is held to a lesser degree than a front seat guest.

An automobile passenger is not held to the same degree of care with respect to lookout as is the driver. Sulkowski, supra at 604; Baker v. Herman Mut. Ins. Co., 17 Wis.2d 597, 606, 117 N.W.2d 725 (1962). A passenger's failure to see developing danger does not always raise a jury question as to negligence with respect to lookout. See Sulkowski, supra, and Lampertius, supra.

The guest is ordinarily chargeable only with "passive" negligence, i.e., negligence causal not of the collision but of the guest's injuries. Hoeft v. Friedel, 70 Wis.2d 1022, 1037, 235 N.W.2d 918 (1975). In Hoeft, however, the passenger acted as an instructor to an inexperienced driver.

The court said, in such a case, the issue of "active" negligence arises and the jury must be instructed as to the passenger's duties which extend beyond the mere obligation to exercise ordinary care for his or her safety. The instructor has the duty to use reasonable care to prevent injuries to others from the operation of the automobile. Liability of the instructor in Hoeft was based not upon an imputation of the driver's negligence to the instructor but upon the failure of the instructor in the exercise of his independent obligation of reasonable care. The trial court erred by failing to instruct the jury on the independent duty of the instructor to supervise and control the automobile.

For a discussion of the distinction between "active" negligence and "passive" negligence, see Comment to Wis JI-Civil 1047.1.

For formulation of special verdict questions in this area, see Theisen, supra at 104-08.

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1076 LOOKOUT: GUEST'S DUTY TO WARN

If a guest sees a situation ahead on the highway that presents a likely danger to safety, and if the guest notices or it is apparent to the guest that the driver does not see it or is oblivious to it, or if the driver sees it and takes no precaution or measure to avoid the danger, then it becomes the duty of the guest to warn the driver of the danger. Failure on the part of the guest to warn the host under such circumstances constitutes a failure to exercise ordinary care for the guest's safety.

COMMENT

This instruction was approved in 1974. The comment was reviewed without change in 1989. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

This instruction supplements Wis JI-Civil 1075 and is intended for use in conjunction with or in addition to 1075 when circumstances require a positive duty of a guest to warn. Teas v. Eisenlord, 215 Wis. 455, 253 N.W. 795 (1934); Howe v. Corry, 172 Wis. 537, 179 N.W. 791 (1920); Wappler v. Schench, 178 Wis. 532, 190 N.W. 555 (1922).

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1080 LOOKOUT: LIMITED DUTY ON PRIVATE PROPERTY

The duty of a driver of a motor vehicle operating a vehicle on private property is not the same as it is on public highways; the obligation to look becomes operative when the driver knows, or in the exercise of ordinary care should know, that someone or something might be affected by the driver's movement. If it appears probable, or in the exercise of ordinary care should appear probable, that pedestrians, vehicles, or other objects may be affected by the driver's movement, then the driver must exercise ordinary care to keep a proper lookout to enable the driver to prevent a collision or injury.

COMMENT

This instruction was approved by the Committee in 1966. The comment was updated in 1982 and was reviewed without change in 1989. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

This instruction is from Heikkila v. Standard Oil Co., 193 Wis. 69, 71, 213 N.W. 652, 653 (1927), which was last approved in Culton v. Van Beek, 256 Wis. 217, 221, 40 N.W.2d 374, 376 (1949). The Culton case also cites Hartzheim v. Smith, 238 Wis. 55, 60, 298 N.W. 196, 198 (1941), and Patterson v. Edgerton Sand & Gravel Co., 227 Wis. 11, 18, 277 N.W. 636, 639 (1938). See also Czarnetzky v. Booth, 210 Wis. 536, 542, 246 N.W. 574, 577 (1933).

The common-law rules of negligence involving parking or management and control of automobiles apply to a private parking lot. Olsen v. Milwaukee Waste Paper Co., 36 Wis.2d 1, 5, 153 N.W.2d 45 (1967). A private road or parking lot is not a "highway" for purposes of the Motor Vehicle Code. Wis. Stat. § 340.01(22) and (46).

The instruction should be phrased in terms of "probability" of harm. In Olsen v. Milwaukee Waste Paper Co., supra at 5, the court said:

> Foreseeability of a possibility of harm is not enough to establish negligence. It is the reasonable probability that harm might ensue which is the basis of foreseeability as an element of negligence.

Also see Wis JI-Civil 1045, Driver's Duty When Children Are Present.

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1090 DRIVER ON ARTERIAL APPROACHING INTERSECTION: LOOKOUT; RIGHT OF WAY; FLASHING YELLOW SIGNAL

While a driver upon a through highway may assume (until the contrary becomes apparent or in the exercise of ordinary care should be apparent) that other users of the highway will obey the statutory rules of the road to stop and yield the right of way, a driver must, nevertheless, use ordinary care to maintain a reasonably careful lookout for vehicles entering upon such through highway so as to enable the driver to take reasonable precautions to avoid injury to the driver or others.

The user of a through highway, having the right to assume the driver on an intersecting highway will stop and yield the right of way, is not bound to so reduce speed at each intersection as to be able to stop at any time it becomes apparent that the other driver is not stopping. Such a requirement would defeat the purpose of the through highway.

When the operator of the vehicle on a through highway observes that the operator of the vehicle on an intersecting highway is not going to yield the right of way, then the driver on the through highway is under a duty to exercise reasonable care to avoid collision or injury, even though the other driver is in the wrong in his or her course of conduct.

(A flashing yellow traffic signal is intended to warn the driver on the through highway of the presence of an intersecting highway which carries an unusual amount of traffic. While the driver on the through highway is not required to stop for such a signal, the driver, to measure up to the standard of ordinary care, must use a higher degree of vigilance before entering upon and crossing such an intersection than would be required at an intersection at which there was no flashing yellow signal.)

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COMMENT

This instruction and comment were approved in 1974. The comment was reviewed without change in 1989. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

See Wis JI-Civil 1030, Right to Assume Due Care by Highway Users, and Wis JI-Civil 1191, Duty of Driver Entering Intersection with Green Light in his Favor.

As to the duty of the driver on the arterial highway to the driver on the nonarterial highway, see generally Lundquist v. Western Casualty & Sur. Co., 30 Wis.2d 159, 163, 140 N.W.2d 241 (1966); Schlueter v. Grady, 20 Wis.2d 546, 553-55, 123 N.W.2d 458 (1963); Gaspord v. Hecht, 13 Wis.2d 83, 87, 108 N.W.2d 137 (1961). The motorist on the arterial highway may have to stop even though he has the right of way. Seitz v. Seitz, 35 Wis.2d 287, 298, 151 N.W.2d 86 (1967).

The operator of an automobile having the right of way on an arterial highway must still maintain a proper lookout. Puhl v. Milwaukee Automobile Ins. Co., 8 Wis.2d 343, 348, 99 N.W.2d 163, 166 (1959); Crye v. Mueller, 7 Wis.2d 182, 189, 96 N.W.2d 520 (1959); Gibson v. Streeter, 241 Wis. 600, 602, 6 N.W.2d 662, 663 (1943).

As to the duty of the driver on a through highway when the driver observes that the driver of the vehicle on an intersecting highway is not going to yield the right of way, see Ashley v. American Auto Ins. Co., 19 Wis.2d 17, 21, 119 N.W.2d 359 (1963); Lawrence v. E. W. Wylie Co., 267 Wis. 239, 244, 64 N.W. 820 (1954); Roeske v. Schmitt, 266 Wis. 557, 569, 64 N.W.2d 394 (1954).

A driver approaching a flashing yellow light or an arterial highway must exercise a higher degree of caution than is required of an arterial driver approaching an intersection without such signal. Ide v. Wamser, 22 Wis.2d 325, 332, 126 N.W.2d 59 (1964).

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1095 LOOKOUT: PEDESTRIAN

A pedestrian, who enters and crosses a street or highway on a crosswalk, must use ordinary care to observe timely the presence, location, and movement of vehicles that may be approaching.

[When a pedestrian crosses at a place other than a crosswalk, it is the pedestrian's duty to maintain a lookout reasonably necessary to enable the pedestrian to yield the right of way to vehicles.]

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 1987 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

This instruction is based on the duty of the pedestrian to yield the right of way. Wis. Stat. § 346.25. Schlewitz v. London & Lancashire Indem. Co., 255 Wis. 296, 299, 38 N.W.2d 700 (1949); Engstrum v. Sentinel Co., 221 Wis. 577, 580-81, 267 N.W. 536 (1936).

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1096 DUTY TO SOUND HORN

A driver must use ordinary care to sound the driver's horn when a careful driver would have sounded his or her horn to warn other users of the highway of the approach of danger.

COMMENT

This instruction and comment were approved in 1974. Editorial changes were made in 1992 to address gender references in the instruction. The instruction was revised in 2008.

Wis. Stat. § 347.38.

This instruction is appropriate in the driver-pedestrian, bicycle rider situation. While there are no Wisconsin decisions precisely in point, we believe that the instruction properly could be given in any case where the sounding of a horn would have alerted another driver of the imminence of danger. It is not designed to cover the passing-driver accident. For this, see Wis JI-Civil 1144 and Wis. Stat. § 346.07.

See also Cook v. Wisconsin Tel. Co., 263 Wis. 56, 56 N.W.2d 494 (1952); Straub v. Schadeberg, 243 Wis. 257, 10 N.W.2d 146 (1943); Patterson v. Edgerton Sand & Gravel Co., 227 Wis .11, 277 N.W. 636 (1938); Leckwe v. Ritter, 207 Wis. 333, 241 N.W. 339 (1932); Hanes v. Hermsen, 205 Wis. 16, 236 N.W. 646 (1931); Vanden Heuvel v. Schultz, 182 Wis .512, 197 N.W. 186 (1924); Tombal v. Farmers Ins. Exch., 62 Wis.2d 64, 214 N.W.2d 291 (1974).

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1105 MANAGEMENT AND CONTROL

A driver must use ordinary care to keep his or her vehicle under proper management and control so that when danger appears, the driver may stop the vehicle, reduce speed, change course, or take other proper means to avoid injury or damage.

[If a driver does not see or become aware of danger in time to take proper means to avoid the accident, the driver is not negligent as to management and control.]

COMMENT

This instruction and comment were approved in 1975 and revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. In 1995, the cross-reference to JI-Civil 1105A was added.

Simon v. Van de Hey, 269 Wis. 50, 54-55, 68 N.W.2d 529 (1955). See also Totsky v. Riteway Bus Service, Inc., 233 Wis.2d 371, 607 N.W.2d 637 (2000).

The duty is not to have the vehicle under control as to avoid accident but to use ordinary care to that end. Beer v. Strauf, 236 Wis. 597, 600-01, 296 N.W. 68 (1941); Schulz v. General Casualty Co., 233 Wis. 118, 126, 288 N.W. 803 (1939).

The second paragraph should be given when the court feels that the evidence raises the issue as to whether the party did or did not see the other car in time to take some effective action to avoid the collision.

For emergency situations, see JI-Civil 1105A.

Stopping is a method by which a driver can manage and control a vehicle. Totsky, supra.

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1105A MANAGEMENT AND CONTROL — EMERGENCY

When you consider negligence as to management and control, bear in mind that a driver may suddenly be confronted by an emergency, not brought about or contributed to by (his) (her) negligence. If that happens and the driver is compelled to act instantly to avoid collision, the driver is not negligent if (he) (she) makes a choice of action or inaction that an ordinarily prudent person might make if placed in the same position. This is so even if it later appears that (his) (her) choice was not the best or safest course.

This rule does not apply to a person whose negligence wholly or in part created the emergency. A person is not entitled to the benefit of this emergency rule unless (he) (she) is without fault in creating the emergency.

You should consider this emergency rule only when you determine whether (name) was negligent as to management and control.

COMMENT

This instruction was approved in 1995 and revised in 2008 and 2015. An earlier version of this instruction was previously numbered Wis JI-Civil 1015. The comment was updated in 1999, 2009, and 2016.

The emergency doctrine is a rule which precludes a finding of negligence when the person is confronted with an emergency. For the doctrine to apply:

(1) the party seeking its benefits must be free from the negligence which contributed to the creation of the emergency;
(2) the time element in which action is required must be short enough to preclude the deliberate and intelligent choice of action;
(3) the element of negligence inquired into must concern management and control.

Edeler v. O'Brien, 38 Wis.2d 691, 697, 698, 158 N.W.2d 301 (1968); Menge v. State Farm Mut. Automobile Ins. Co., 41 Wis.2d 578, 582, 583, 164 N.W.2d 495 (1969); Leckwee v. Gibson, 90 Wis.2d 275, 288, 280 N.W.2d 186 (1979).

In Totsky v. Riteway Bus Service, Inc., 233 Wis.2d 371, 607 N.W.2d 637 (2000), the trial court decided that the emergency doctrine can never absolve a party of a violation of a safety statute. The court of appeals and supreme court disagreed.

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The supreme court said the emergency doctrine can apply to the violation of a safety statute, excusing what otherwise would be negligence per se, but only in situations where the three required tests of emergency are met.

The "emergency doctrine" was at issue in Leckwee v. Gibson, supra, wherein the court, discussed prevailing Wisconsin law on the doctrine:

> The plaintiff argues that he could not properly be found negligent as to management and control, invoking the principles of the emergency doctrine. The emergency doctrine, recently summarized in Tombal v. Farmers Ins Exchange, supra, 62 Wis.2d at 70, states:
>
> The doctrine, as stated in Papacosta v. Papacosta, 2 Wis.2d 175, 85 N.W.2d 790 (1957), is that a person faced with an emergency which his conduct did not create or help to create is not guilty of negligence in the methods he chose, or failed to choose, to avoid the threatened disaster if he is compelled to act instantly without time for reflection. Seif v. Turowski, 49 Wis.2d 15, 23 181 N.W.2d 388 (1970).

See also Lutz v. Shelby Mut. Ins. Co., 70 Wis.2d 743, 235 N.W.2d 426 (1975).

To determine whether the emergency doctrine should be given or whether in certain cases it should be given as to one driver but not as to the other, see Gage v. Seal, 36 Wis.2d 661, 154 N.W.2d 354 (1967); Geis v. Hirth, 32 Wis.2d 580, 146 N.W.2d 459 (1966); Metz v. Rath, 275 Wis. 12, 18-19, 81 N.W.2d 34 (1957); Ackley v. Farmers Mut. Auto Ins. Co., 273 Wis. 422, 425-26, 78 N.W.2d 744 (1956); Misiewicz v. Waters, supra; Krause v. Milwaukee Mut. Ins. Co., 44 Wis.2d 590, 604-06, 172 N.W.2d 181 (1969); Hardware Mut. Casualty Co. v. Harry Crow & Son, Inc., 6 Wis.2d 396, 405, 94 N.W.2d 577 (1959).

Since this instruction relieves a driver who is confronted with an emergency from being labeled negligent in connection with his manner of driving, i.e., his or her management and control, it should not be given unless that driver's management and control are at issue. Schmit v. Sekach, 29 Wis.2d 281, 289, 139 N.W.2d 88 (1966); Menge v. State Farm Mut. Automobile Ins. Co., 41 Wis.2d 578, 582-84, 164 N.W.2d 495 (1969), see also Lievrouw v. Roth, 157 Wis.2d 332, 459 N.W.2d 850 (Ct. App. 1990).

The emergency doctrine is directed to the question of negligence rather than the question of causation. Kuentzel v. State Farm Mut. Auto Ins. Co., 12 Wis.2d 72, 76, 106 N.W.2d 324 (1960).

In Garceau v. Bunnel, 148 Wis.2d 146, 434 N.W.2d 794 (Ct. App. 1988), the court of appeals said that the testimony did not support the conclusion that an insect striking the driver of a vehicle created an emergency situation. However, in a footnote, the court recognized there may be situations in which an insect sting or bite might create an emergency. See 148 Wis.2d at 154 n. 2.

Use in Non-Motor Vehicle Cases. For the adaptation of this instruction to a case not involving a motor vehicle, see McCrossen v. Nekoosa Edwards Paper Co., 59 Wis.2d 245, 208 N.W.2d 148 (1973); see also Kelly v. Berg, 2015 WI App 69, 365 Wis.2d 83, 870 N.W.2d 481.

Rescue Rule. For a discussion of both the emergency doctrine and the rescue rule, see Kelly v. Berg, supra.

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1107 RACING

A safety statute provides that no driver of a motor vehicle shall participate in a race upon any highway.

A "race" is an intentional contest of speed or acceleration between two or more vehicles.

In determining whether (the drivers of the vehicles involved) were participating in a race, you should consider the conduct of the drivers as a whole, including speed of the vehicles, the relative position of the vehicles on the highway and with respect to each other, and whether there was an intention by them to compete.

Failure to comply with this safety statute is negligence.

COMMENT

This instruction and comment were approved by the Committee in 1981 and revised in 2008.

The first paragraph refers to Wis. Stat. § 346.94(2).

Madison v. Geier, 27 Wis.2d 687, 135 N.W.2d 761 (1964).

In a race, the participants share equally the responsibility for damage done by any participant. Ogle v. Avina, 33 Wis.2d 125, 146 N.W.2d 422 (1966).

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1112 OPERATION OF AUTOMOBILE FOLLOWING ANOTHER

The driver of a motor vehicle should not follow another vehicle more closely than is reasonable and prudent.

In determining whether a driver was following the vehicle ahead more closely than was reasonable and prudent, you should consider the speed and location of both vehicles, the amount of traffic, the condition of the highway, and the visibility at the time.

COMMENT

The instruction and comment were originally published in 1966 and revised in 1984. The instruction was reviewed without change in 2008. The comment was updated in 1989. An editorial correction was made in 2015 to replace the term, "guilty of."

Wis. Stat. § 346.14(1).

The second paragraph is taken substantially from Hibner v. Lindauer, 18 Wis.2d 451, 456, 118 N.W.2d 873 (1963). See also Northland Ins. Co. v. Avis Rent-a-Car, 62 Wis.2d 643, 215 N.W.2d 437 (1974).

The trial court committed no error in instructing the jury in regard to negligence as to lookout and refusing to instruct on following too closely, where the evidence revealed that the factor resulting in the impact was failure to keep a proper and reasonably constant lookout, and there was no evidence from which one could have concluded that the truck driver could not have stopped in time or avoided the collision had he not been negligent as to lookout. Milwaukee & Suburban Transp. Corp. v. Royal Transit Co., 29 Wis.2d 620, 139 N.W.2d 595 (1966).

In Millonig v. Bakken, 112 Wis.2d 445, 458n.2, 334 N.W.2d 80 (1983), the plaintiff unsuccessfully argued that, under the facts presented at trial, the jury should have been given Wis JI-Civil 1055, Lookout, and Wis JI-Civil 1285, Speed, instead of Wis JI-Civil 1112.

In Northland Ins. Co. v. Avis Rent-A-Car, supra at 649, the court noted that Wis. Stat. § 346.14(1), "the tailgating statute," protects not only the preceding vehicle and its occupants but also all other cars and persons who are causally affected by the negligence of tailgating.

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The court, in Northland Ins. Co. v. Avis Rent-A-Car, also addressed itself to multiple rear-end collisions, stating:

> We do not think that because one person is negligent in his driving that other people on the highway are justified in driving negligently. We agree with Mr. Justice Fowler in his dissent to the Bourestom Case, 231 Wis. 666, 285 N.W. 426 (1934), when he said, page 676:
>
> The purpose of holding a trailing driver to a proper distance is to keep him in position to stop or so control his car as to prevent him from doing injury because of the action of the car ahead, whatever be the cause of that action, and regardless of whether that action results from something being in the road ahead of the preceding car as a result of negligence of a third person or independent of negligence of anybody. 62 Wis.2d at 648.

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1113 DUTY OF PRECEDING DRIVER: SLOWING OR STOPPING: SIGNALLING

The statutes provide that no person may stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal by brake lights or by hand to the driver of any vehicle immediately to the rear when there is opportunity to give a signal.

It is for you to determine whether (driver of the front car) indicated by proper signal (his) (her) intention to stop or suddenly decrease speed, and if not, then whether (driver of the front car) had an opportunity to do so.

COMMENT

The instruction and comment were originally published in 1966 and revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Wis. Stat. §§ 346.34(2), 346.35.

A driver who gives a timely signal of stopping by means of brake lights is not required to give a hand signal in addition. Johnson v. McDermott, 38 Wis.2d 185, 190, 137 N.W.2d 107 (1968); St. Clair v. McDonnell, 32 Wis.2d 469, 476, 145 N.W.2d 773 (1966); Thompson v. Nee, 12 Wis.2d 326, 328, 107 N.W.2d 150 (1961); Tesch v. Wisconsin Pub. Serv. Corp., 2 Wis.2d 131, 137, 85 N.W.2d 762 (1957); Wodill v. Sullivan, 270 Wis. 591, 598, 72 N.W.2d 396 (1955).

The duty of lookout to the rear of the preceding driver is dealt with in Wis JI-Civil 1114.

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1114 DUTY OF PRECEDING DRIVER TO FOLLOWING DRIVER: LOOKOUT

The driver of a vehicle who intends to deviate from (his) (her) course of travel, (suddenly stop) (or) (decrease speed) in such a manner that would create a hazard to vehicles following in a lawful manner must use ordinary care to make a lookout to the rear before making the movement. Otherwise, a driver owes no duty to the driver(s) of (a) (the) vehicle(s) behind (him) (her), except to use the road in the usual way, in keeping with the laws of the road.

Until a driver has been made aware of the car behind by signal or otherwise, the driver has a right to assume either that there is no other vehicle in close proximity to the rear or that being there, it is under such control as not to interfere with the free use of the road in front of and to the sides, in any lawful manner.

COMMENT

The instruction and comment were originally published in 1960. The instruction was revised in 1980, 2002, and 2008. The comment was updated in 1989.

In Krainz v. Strle, 81 Wis.2d 26, 29, 259 N.W.2d 707 (1977). The court held that a driver of an automobile under some circumstances has the duty of making an observation to the rear to see if he or she can stop or slow down on a highway with safety. Bentzler v. Braun, 34 Wis.2d 362, 149 N.W.2d 626 (1966); Diener v. Heritage Mut. Ins. Co., 37 Wis.2d 411, 155 N.W.2d 37 (1967).

This instruction should not be used when the driver of a front vehicle deviates from his or her lane of travel. Westfall v. Kottke, 110 Wis.2d 86, 328 N.W.2d 481 (1983).

The court in Hillstead v. Smith, 44 Wis.2d 560, 568-69, 171 N.W.2d 315 (1969), clearly explained its retreat from the former principle regarding the duty of lookout to the rear:

> It is clear from Bentzler that it can no longer be said that a driver has no duty of lookout to the rear in all cases. In Bentzler, we took the position, following the dicta of Jacobson v. Greyhound Corp. (1965), 29 Wis.2d 55, 138 N.W.2d 133, that a duty to maintain a lookout to the rear clearly exists when a driver's position on the

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highway would be likely to constitute a hazard to drivers approaching from the rear or when he was about to execute a maneuver which created a potential hazard to following traffic. In Diener v. Heritage Mut. Ins. Co. (1967), 37 Wis.2d 411, 155 N.W.2d 37, we required an efficient lookout to the rear, for the reason that lookout to the front was not preempted by circumstances that required the driver's attention and lookout ahead of him.

As to the duty of lookout of the preceding driver to the following driver when the preceding driver deviates or turns, see Wis JI-Civil 1354 and 1355.

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1115 PARKING: STOPPING: LEAVING VEHICLE OFF THE ROADWAY

A safety statute provides that the (parking,) (stopping,) (or) (standing) of a vehicle off the roadway is unlawful unless there is left an unobstructed width of at least 15 feet upon the roadway opposite the (parked) (stopped) (standing) vehicle for the free passage of other vehicles. A vehicle is off the roadway when it is upon the shoulder adjacent to the concrete or traveled portion of the highway.

The statute also provides that a standing vehicle must be left in a position that can be seen by drivers of other vehicles from a distance of 500 feet in each direction along the highway.

[If there is evidence that the vehicle was disabled, add Wis JI-Civil 1125 Parking; Stopping: Leaving Vehicles on the Roadway; Exceptions.]

COMMENT

This instruction and comment were approved in 1975 and revised in 2008.

Wis. Stat. § 346.51(1)(a) and 346.51(1)(b).

This instruction and the question covered by it are not to be given if the jury's answer to the question relating to negligence in stopping on the roadway is in the affirmative. The question should be given in the alternative to avoid duplication. Robinson v. Briggs Transp. Co., 272 Wis. 448, 453-58, 76 N.W.2d 294 (1956). It is prejudicial error to consider findings of negligence under § 346.51(1)(a) and (b) as cumulative to negligence under § 346.51(1). Guderyon v. Wisconsin Tel. Co., 240 Wis. 215, 229, 2 N.W.2d 242 (1942).

If there is an issue as to lighting equipment or display of warning devices, add an instruction based on Wis. Stat. § 347.27 or § 347.29. Robinson v. Briggs Transp. Co., supra at 456-61; Swanson v. Maryland Casualty Co., 266 Wis. 357, 364-65, 63 N.W.2d 743 (1954).

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1120 PARKING: STOPPING: LEAVING VEHICLE ON THE ROADWAY

A safety statute provides that no person shall (park) (stop) (or) (leave standing) any vehicle, whether attended or unattended, upon the roadway of any highway outside a business or residential district when it is practical to park, stop or leave standing the vehicle off the roadway. Roadway means that portion of a highway [between the regularly established curb lines or that portion] which is improved, designed, or ordinarily used for vehicular travel, excluding the berm or shoulder. [On a divided highway, the term refers to each roadway separately but not to all roadways collectively.]

In determining whether it was practical to move the vehicle to, and leave it standing at, a place off the roadway, you may consider the physical conditions adjacent to the place where the vehicle was parked, stopped, or left standing, any other possible parking spaces, in any direction, to which the vehicle might reasonably have been taken, as well as the reason for stopping.

[If there is evidence of disability, add Wis JI-Civil 1125.]

COMMENT

This instruction and comment were approved in 1975 and updated in 2008.

Wis. Stat. § 346.51(1); roadway, § 340.01(54). Exceptions to this statute are provided in Wis. Stat. § 346.51(a) and (b).

La Fave v. Lemke, 3 Wis.2d 502, 506, 89 N.W.2d 312 (1958); Puccio v. Mathewson, 260 Wis. 258, 267, 50 N.W.2d 390 (1951); Kline v. Johanneson, 249 Wis. 316, 319, 24 N.W.2d 595 (1946).

If there is an issue as to lighting equipment or display of warning devices, add an instruction based on Wis. Stat. § 347.27 or § 347.29. Robinson v. Briggs Transp. Co., 272 Wis. 448, 456-61, 76 N.W.2d 294, 298-300 (1956); Swanson v. Maryland Casualty Co., 266 Wis. 357, 364-65, 63 N.W.2d 743, 746-47 (1954).

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The graded, but unfinished bed of a highway lane under construction is not a "roadway" under Wis. Stat. § 340.01(54). Burg v. Cincinnati Cas. Ins. Co., 2002 WI 76, 254 Wis.2d 36, 645 N.W.2d 880.

Legislative Council Note, 1977: The definitions of "park and parking" in sub. (42m) and "stand or standing" in (59m) are derived from ss. 1-141 and 1-168, respectively, of the Uniform Vehicle Code (1968 revised edition; suppl. I, 1972). The principal difference between "parking" and "standing", as defined, is that "standing" infers a temporary cessation of movement other than for purposes of and while actually engaged in receiving or discharging passengers while "parking" infers a protracted cessation of movement for purposes other than temporarily halting to load or unload property or passengers. See the note to s. 349.13 (1) for further explanation. [Bill 465-A]

"Roadway" means that portion of a highway between the regularly established curb lines or that portion which is improved, designed or ordinarily used for vehicular travel, excluding the berm or shoulder. In a divided highway the term "roadway" refers to each roadway separately but not to all such roadways collectively. Wis. Stat. § 340.01(54).

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1125 PARKING: STOPPING: LEAVING VEHICLE ON OR OFF THE ROADWAY: EXCEPTION TO PROHIBITION

A statute further provides that the prohibition against (parking) (stopping) (leaving) a vehicle (on the roadway) (off the roadway) does not apply when the vehicle becomes disabled while (on the roadway) (off the roadway) in such a manner (to such an extent) that it is impossible to avoid stopping or temporarily leaving the vehicle in the prohibited place. A vehicle is disabled when the (parking) (stopping) (leaving) of the vehicle (on the roadway) (off the roadway) cannot reasonably be avoided, and it is impossible to move the vehicle under the existing conditions and circumstances. A vehicle is left temporarily when it is stopped for such period of time only as is necessary to permit the driver to take reasonable steps to remove the vehicle.

COMMENT

The instruction and comment were originally published in 1960 and revised in 2008. The comment was updated in 1980.

Wis. Stat. § 346.50(1). This instruction deals with one of the three exceptions in Wis. Stat. § 346.50.

Henthorn v. M.G.C. Corp., 1 Wis.2d 180, 187, 83 N.W.2d 759, 764 (1957); Western Casualty & Sur. Co. v. Dairyland Mut. Ins. Co., 273 Wis. 349, 355-56, 77 N.W.2d 599, 602 (1956); Woodcock v. Home Mut. Casualty Co., 253 Wis. 178, 185, 33 N.W.2d 202, 204-05 (1948). See also Andraski v. Gormley, 3 Wis.2d 149, 87 N.W.2d 818 (1958), and "Law of Negligence Relating to Parking Regulations," 1955 Wis. L. Rev. 1955.

Where disability cannot be found as a matter of law, and where there is a conflict for the jury as to disability, this instruction is to be given along with Wis JI-Civil 1115, Parking: Stopping: Leaving Vehicle off the Roadway, or 1120, Parking: Stopping: Leaving Vehicle on the Roadway.

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1132 STOPPED SCHOOL BUS: POSITION ON HIGHWAY

A school bus when loading or unloading passengers must be stopped with its flashing red warning lights activated and must be stopped on the traveled portion of the highway as near as practicable to the right-hand edge of the lane farthest to the right which is improved, designed, or ordinarily used for vehicular travel excluding the berm or shoulder.

While the law provides that a school bus while loading or unloading with flashing red warning lights activated must stop on the traveled portion of the highway, nevertheless the law requires the school bus driver to use ordinary care to determine whether the stop can be safely made on the paved or traveled portion of the roadway of the highway. The driver is required to take into account such factors as weather, atmospheric conditions of visibility, conditions of the surface of the highway, the topography and the course of the highway, the visibility of the bus to oncoming traffic, and any and all other conditions and circumstances as would be taken into account by a reasonable school bus driver acting under the same or similar circumstances.

COMMENT

This instruction and comment were approved in 1977 and revised in 1990, 1992, and 2008.

Wis. Adm. Code Trans. § 300.16(8); Wis. Stat. § 346.48(2); Alden v. Matz, 8 Wis.2d 485, 477, 488, 99 N.W.2d 757 (1959); Verbeten v. Huettl, 253 Wis. 510, 514, 34 N.W.2d 803 (1948).

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1133 SCHOOL BUS: FLASHING RED WARNING LIGHTS

A Department of Transportation regulation provides that a school bus shall be equipped with 2 red warning lamps at the rear, and 2 red warning lamps at the front of the bus which shall be controlled by a manually (actuated) activated switch, which lamps shall flash alternately to inform other users of the highway that the vehicle is stopped or about to stop on the highway to take on or discharge school children. These red warning lamps shall be visible from a distance of at least 500 feet to the front and to the rear of the bus in bright sunlight. There shall be a visible or audible means of giving clear or unmistakable indication to the bus driver when the signalling system is turned on.

A safety statute provides that the operator of a school bus equipped with flashing red warning lights shall activate the lights at least 100 feet before stopping to load or unload pupils or other authorized passengers and shall not extinguish the lights until loading or unloading is completed and persons who must cross the highway are safely across.

A failure to comply with the regulation and safety statute is negligence.

COMMENT

This instruction and comment were approved in 1977 and revised in 2008. The comment was updated in 1990.

Wis. Adm. Code Trans § 300.16(6); Wis. Stat. § 346.48(1); Alden v. Matz, 8 Wis.2d 485, 99 N.W.2d 757 (1959); Verbeten v. Huettl, 253 Wis. 510, 34 N.W.2d 803 (1948).

If the bus was stopped in a special school bus loading area where the bus is entirely off of the traveled portion of the highway, or it is stopped in a residence or business district when passengers are to be loaded or unloaded where a sidewalk and curb are laid on both sides of the road, no flashing red warning lights are required to be activated as provided in Wis. Stat. § 346.48(2)(b)1, 2. It may be that if the bus were so stopped in the excepted places, some consideration might be given to instructing on the absence of the requirement of activating the flashing lights just to negative any possibility that some juror would come to the conclusion that the driver was negligent because he or she wasn't displaying his or her flashing lights.

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1135 POSITION ON HIGHWAY ON MEETING AND PASSING

A safety statute provides that upon all roadways of sufficient width, the operator of a vehicle shall drive on the right half of the roadway (and in the right-hand lane of a 3-lane highway) (except when _____).

[Define "roadway" appropriately to the facts of the case.]

Wisconsin statutes further provide that operators of vehicles proceeding in opposite directions shall pass each other to the right, and, upon roadways having width for not more than one line of traffic in each direction, each operator shall give to the other at least one-half of the main traveled portion of the roadway as nearly as possible.

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2008.

Wis. Stat. §§ 346.05, and 346.06.

Wis. Stat. § 346.05 contains exceptions as to the requirements of driving in the right lane or on the right side. See Wis JI-Civil 1140.

The term "roadway" is defined in Wis. Stat. § 340.01(54) and Wis JI-Civil 1160.

The presence of a vehicle on the left side of a highway may present a jury question as to negligence, Booth v. Frankenstein, 209 Wis. 362, 366, 246 N.W. 191 (1932), or may be negligence as a matter of law, Seligman v. Hammond, 205 Wis. 199, 202, 236 N.W. 115 (1931).

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1140 POSITION ON HIGHWAY ON MEETING AND PASSING; VIOLATION EXCUSED

Driving a motor vehicle on the wrong side of the roadway at the time of (or immediately before) a collision is negligence unless there was an explanation satisfactory to you that the driver was free from negligence in being on the wrong side of the roadway.

(Falling asleep at the wheel is not a satisfactory explanation. It is negligence itself.)

(If a driver is on the wrong side of the roadway as he or she approaches an oncoming car at such time and distance from the point of collision that the oncoming driver would be obliged to take some precaution to avoid an accident by reducing speed, stopping, or changing course of travel, then the driver is negligent with respect to yielding one-half of the travelable portion of the roadway, even though the driver may have returned to the proper side of the roadway before the impact.)

[Any of the following paragraphs may be used where appropriate:

(a) A driver is not negligent in failing to operate a vehicle on the right-hand side of the roadway when it is impossible to know where the right-hand side of the roadway is by reason of circumstances which occur suddenly and without warning and over which the driver had no control and for which the driver was in no way responsible, such as (glaring headlights of an oncoming automobile) (a sudden cloud of dust).

(b) A driver is not negligent in failing to operate a vehicle upon the right side of the roadway when it is impossible to do so because the vehicle, suddenly and without warning, due to mechanical failure such as (a blow-out) (other mechanical failure) caused

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the driver to lose control. This rule does not apply if the driver knew or in the exercise of ordinary care should have known of the faulty mechanical condition prior to the accident.

(c) (Skidding; see Wis JI-Civil 1280.)]

COMMENT

This instruction was approved in 1977 and revised in 2002 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

See Wis. Stat. §§ 346.05 and 346.06 and notes to these sections in Wis. Stat. Ann. The term "roadway" is defined in Wis. Stat. § 340.01(54).

Position on highway is covered in Wis JI-Civil 1135, Position on Highway on Meeting and Passing, parts of which should be used here.

Mere operation of a motor vehicle on the wrong side of highway is prima facie negligence, a genuine inference of fact and not a mere legal presumption which inference can be overcome only by an explanation of nonnegligence that the jury is bound to accept, Kempfer v. Bois, 255 Wis. 312, 314, 38 N.W.2d 483 (1949); Zeinemann v. Gasser, 251 Wis. 238, 243, 29 N.W.2d 49 (1947) (skidding); Hamilton v. Reinemann, 233 Wis. 572, 581, 290 N.W. 194 (1940) (tractor-trailer jack-knifing); Booth v. Frankenstein, 209 Wis. 362, 365-66, 245 N.W. 191 (1932) (blow-out of tire involved in impact rejected by jury as explanation, presumption of deceased's due care dropped out by wrong-side driving inference of negligence); approved to be given in exact words of Kempfer v. Bois, as applicable to both drivers in Schwartz v. Schneuriger, 269 Wis. 535, 545, 69 N.W.2d 756 (1955) (jury accepted defendant's explanation of last minute swing to left to avoid plaintiff who was driving in center). Kempfer v. Bois expressly overruled that part of Seligman v. Hammond, 205 Wis. 199, 204, 236 N.W. 115 (1931), which held that burden was to prove wrong-side driving was caused by negligence.

"The inference of negligence when one invades the wrong lane is a vigorous one; the inference is not dissipated unless the driver so invading the wrong lane proves that he was without fault." Voigt v. Voigt, 22 Wis.2d 573, 584, 126 N.W.2d 653 (1964).

Goldenberg v. Daane, 13 Wis.2d 98, 104, 108 N.W.2d 187 (1961), states that when some evidence of nonnegligence in wrong-side driving is introduced, there is no occasion to instruct on the inference of negligence from wrong-side driving. This is directly contrary to Schwartz v. Schneuriger, supra, and in conflict with statement in Voigt v. Voigt that wrong-side driver has "burden of going forward with evidence to prove that such invasion was non-negligent." The ultimate burden of course is on party asking a "yes" to the ultimate negligence question.

Sleeping is not a nonnegligent explanation. Theisen v. Milwaukee Auto Mut. Ins. Co., 18 Wis.2d 91, 118 N.W.2d 140 (1962).

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As to wrong-side driving with last minute switch-back to right side, see Havens v. Havens, 266 Wis. 282, 63 N.W.2d 86 (1954); Stevens v. Farmers Mut. Auto Ins. Co., 268 Wis. 25, 66 N.W.2d 668 (1954); Schwartz v. Schneuriger, supra; Nothem v. Berenschot, 3 Wis.2d 585, 89 N.W.2d 289 (1958).

As to dust as an unexpected condition, see Johnson v. Prideaux, 176 Wis. 375, 378, 187 N.W. 207 (1922). As to glaring headlights, see Odya v. Quade, 4 Wis.2d 63, 72, 90 N.W. 96 (1958).

See Bunkfeldt v. Country Mut. Ins. Co., 29 Wis.2d 179, 184, 138 N.W.2d 271 (1965), where evidence of mechanical failure was insufficient to rebut the inference of negligence which arose from wrong-side driving.

As to negligence concurring with unexpected mechanical failure nevertheless being a cause, see Foellmi v. Smith, 15 Wis.2d 274, 280, 112 N.W.2d 712 (1961).

Instructions on unexpected mechanical failure, especially where no collision with another, vehicle is involved, may be submitted under management and control, if the driver has warning of some abnormal operation probably caused by a defective condition, it being the driver's duty to stop and investigate. See Kowalke v. Farmers Mut. Auto Ins. Co., 3 Wis.2d 389, 401, 88 N.W.2d 747 (1958).

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1141 PASSING: VEHICLES PROCEEDING IN SAME DIRECTION

[Insert appropriate paragraphs of Wis JI-Civil 1055.]

A safety statute provides that upon any roadway where traffic is permitted to move in both directions simultaneously, the driver of a vehicle shall not drive to the left of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction, unless the left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit the overtaking and passing to be done in safety.

To comply with the statute, the driver must, before making such movement, exercise reasonable care to make an efficient lookout. A driver must not only exercise ordinary care to determine the presence and location of other vehicles that may be approaching from the opposite direction, but must also exercise reasonable judgment in calculating the time required to overtake and pass the vehicle in front, as well as the distance away and speed of any vehicle approaching from the opposite direction.

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2002 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Wis. Stat. § 346.09(1).

On lookout generally, see Plog v. Zolper, 1 Wis.2d 517, 85 N.W.2d 492 (1957), and Grana v. Summerford, 12 Wis.2d 517, 107 N.W.2d 463 (1961). Leckwee v. Gibson, 90 Wis.2d 275, 288, 280 N.W.2d 186 (1979).

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1142 PASSING: VEHICLES PROCEEDING IN SAME DIRECTION; OBSTRUCTED VIEW

A safety statute provides that, upon any roadway where traffic is permitted to move in both directions simultaneously, the driver of a vehicle shall not drive on the left side of the center of the roadway upon any part of a grade or upon a curve in the roadway where the driver's view is obstructed for such a distance as to create a hazard in the event another vehicle might approach from the opposite direction.

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2008.

Wis. Stat. § 346.09(2).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

This instruction is to be used, where appropriate under the evidence, with a question inquiring as to either management and control or position on the roadway.

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1143 PASSING: VEHICLES PROCEEDING IN SAME DIRECTION: IN NO PASSING ZONE OR WHERE OVERTAKEN VEHICLE TURNING LEFT

A safety statute provides that the driver of a vehicle shall not drive on the left side of the center of a roadway, or any portion of the roadway which has been designated as a no-passing zone, either by a sign or by a yellow unbroken line on the pavement on the right side of, and adjacent to, the center line of the roadway, if the sign or lines would be clearly visible to an ordinarily observant person.

If you determine that the no-passing sign (lines) was (were) clearly visible to one who was ordinarily observant and you also determine that (_____) violated the provisions of this statute just before the collision, then (_____) would be negligent.

(A safety statute provides that, in any event, a driver of a vehicle shall not overtake and pass on the left any other vehicle which by means of a signal required by law indicates its intention to make a left turn.)

(The signal referred to in this safety statute is a signal given continuously by either a mechanical signal device or by hand and arm for a distance of not less than 100 feet before turning.)

COMMENT

This instruction and comment were approved by the Committee in 1977. The instruction was revised in 2008. The comment was updated in 2001.

Use paragraphs three and four where appropriate.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

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Wis. Stat. §§ 346.09(3) and (4); 346.34(1); 346.35.

The first paragraph may not be applicable if the evidence reveals that the operator may have crossed the no passing line in an effort to avoid collision with an oncoming vehicle. The statute is meant to cover only the situation of overtaking and passing.

With respect to position on highway, see Wis JI-Civil 1135.

Passing on the Right. For an instruction on passing on the right, Wis. Stat. § 346.08, see Kaufman v. Postle, 2001 WI App 86, 243 Wis.2d 45, 626 N.W.2d 10. In Kaufman, the trial court gave the following instruction:

> A safety statute provides: The operator of a vehicle may overtake and pass another vehicle upon the right only under conditions permitting such movement in safety and only if the operator can do so without driving off the pavement or the main traveled portion of the roadway. A driver may not pass traffic on the right using any part of the road's shoulder. To do so is a violation of the Rules of the Road section permitting motor vehicle operators to pass on the right only when such can be done without driving off the main traveled portion of the roadway.

In Kaufman, the defendant's vehicle struck the plaintiff's vehicle while the defendant was driving on the right-hand paved shoulder in an attempt to pass the plaintiff. The defendant argued the trial court's instruction was wrong by telling the jury that a driver may not pass traffic on the right using any part of the road's shoulder. The defendant argued that Wis. Stat. § 346.08 allows a driver to use the shoulder of a road to pass another vehicle on the right side if the vehicle that is being passed is turning left and the shoulder is paved. The court of appeals rejected the defendant's analysis of the statute and held that the trial court's instruction was correct in explaining to the jury that a driver may not pass on the right using any part of the shoulder.

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1144 PASSING: VEHICLES PROCEEDING IN SAME DIRECTION

A safety statute provides that the driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left of the overtaken vehicle, at a safe distance, and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle.

COMMENT

This instruction and comment were originally approved in 1977. The instruction was revised in 2002 and reviewed without change in 2008. The comment was updated in 1989, 2002, and 2015.

Wis. Stat. § 346.07(2); for definition of "roadway," see Wis. Stat. § 340.01 (54), Wis JI-Civil 1160.

Whether § 346.07(2) or (3), or both, should be used in a particular case will depend upon the evidence. In this regard, see Engsberg v. Hein, 265 Wis. 58, 62, 60 N.W.2d 714 (1953). With respect to the instruction itself, see Bovi v. Mellor, 253 Wis. 458, 464, 34 N.W.2d 780 (1948).

Other possible elements of negligence which may arise at the time of passing, such as lookout or speed, will be submitted separately. This instruction might be used in connection with the question as to management and control, in lieu of the inquiry as to negligence with respect to the manner of passing. See Anderson v. Stricker, 266 Wis. 1, 4, 62 N.W.2d 396 (1953).

A statutory provision (§ 346.07(1)) requiring the overtaking vehicle to give an audible warning when passing in a non-business or non-residential district was repealed in 1977. 1997 Wisconsin Act 32. In 2014, a requirement in Wis. Stat. § 346.59(2) that the operator of a vehicle moving at a slow speed yield to an overtaking driver who gives an audible signal was removed. 2013 Wisconsin Act 365.

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1145 RES IPSA LOQUITUR

If you find (defendant) had (exclusive control of) (exclusive right to the control of) the (name the instrument or agency involved) involved in the accident and if you further find that the accident claimed is of a type or kind that ordinarily would not have occurred had (defendant) exercised ordinary care, then you may infer from the accident itself and the surrounding circumstances that there was negligence on the part of (defendant) unless (defendant) has offered you an explanation of the accident which is satisfactory to you.

COMMENT

This instruction and comment were approved by the Committee in 1977. The comment was updated in 1989 and 2001.

The alternate phrase "exclusive right to the control of" should be used in those cases where defendant disavows exclusive control because he has delegated (by contract or otherwise) the duty of repair or maintenance of the instrument or agency to another. Turk v. H. C. Prange Co., 18 Wis.2d 547, 119 N.W.2d 365 (1963); Koehler v. Thiensville State Bank, 245 Wis. 281, 14 N.W.2d 15 (1944). Goebel v. General Bldg. Serv. Co., 26 Wis.2d 129, 131 N.W.2d 852 (1964), is a situation where several parties might have exercised control.

The following conditions must be present before the doctrine of res ipsa loquitur is applicable: (1) the event in question must be of a kind which does not ordinarily occur in the absence of negligence; and (2) the agency of instrumentality causing the harm must have been within exclusive control of the defendant. When these two conditions are present, they give rise to a permissible inference of negligence, which the jury is free to accept or reject. Lambrecht v. Estate of Kaczmarczyk, 2001 WI 25, 241 Wis.2d 804, 623 N.W.2d 751.

The court decides as a preliminary matter of law that the inference is reasonable; if not, the instruction is not given.

Insert the facts of the case in the instruction if desired. This instruction was approved by implication in Brunner v. Van Hoof, 4 Wis.2d 459, 464, 90 N.W.2d 551 (1958); Colla v. Mandella, 271 Wis. 145, 149-50, 72 N.W.2d 755 (1955); and Georgia Casualty Co. v. American Milling Co., 169 Wis. 456, 460, 172 N.W. 148 (1919).

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The mere happening of a collision is not probative that someone has been negligent. Millonig v. Bakken, 112 Wis.2d 445, 334 N.W.2d 80 (1983). In Millonig, the court said that res ipsa loquitur "only creates a permissive inference" and for the doctrine to apply one of the necessary elements is that the accident probably would not have occurred but for the negligent of the defendant. 112 Wis.2d, at p. 457.

The instruction does not cover negligence on the part of plaintiff, since Wisconsin has a comparative negligence law.

This instruction applies to host-guest cases. Turk v. H. C. Prange Co., supra. Henthorn v. MGC Corp., 1 Wis.2d 180, 187, 83 N.W.2d 759 (1957); Modl v. National Farmers Union Prop. & Casualty Co., 272 Wis. 650, 656, 76 N.W.2d 599 (1956).

Res ipsa can be used in strict liability cases. Jagmin v. Simonds Abrasive Co., 61 Wis.2d 60, 211 N.W.2d 810 (1973).

This instruction is proper even though plaintiffs have tried to prove specific negligence and have failed. Commerce Ins. Co. v. Merrill Gas Co., 271 Wis. 159, 168, 72 N.W.2d 771 (1955).

If res ipsa loquitur rests on data which was used as the basis for an allegation of a specific act of negligence, but the inference of negligence so raised was rebutted, then res ipsa loquitur is not in the case. Brunner v. Van Hoof, supra at 464, citing Gay v. Milwaukee Elec. Ry. & Light Co., 138 Wis. 348, 353-54, 120 N.W. 283 (1909).

Where an event which caused injury to the plaintiff might have been caused by a specific act of X or by inferred negligence of the defendant who was in control of the situation, the jury should be instructed that res ipsa would be applicable only if it first found that the specific act did not cause the event. Mixis v. Wisconsin Pub. Serv. Comm'n, 26 Wis.2d 488, 132 N.W.2d 769 (1965).

The burden of proof (persuasion) does not shift from plaintiff to defendant, and it is error to so state. Ziino v. Milwaukee Elec. Ry. & Transp. Co., 272 Wis. 21, 24, 74 N.W.2d 791 (1956).

See Drechsler, "The Doctrine of Res Ipsa Loquitur," Wis. Bar Bulletin, April 1957, at 13.

If no instruction is requested in the trial court, the supreme court will not consider res ipsa loquitur for the first time on appeal. Ahola v. Sincock, 6 Wis.2d 332, 349, 94 N.W.2d 566 (1959).

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1153 RIGHT OF WAY: AT INTERSECTION WITH THROUGH HIGHWAY

A safety statute provides that the driver of a vehicle shall stop before entering a through highway and shall yield the right of way to other vehicles which have entered or are approaching the intersection upon the through highway.

The statutes define "right of way" as the privilege of the immediate use of the roadway.

The highway on which (name) was driving was, at the time of the collision, a "through highway" as defined by the statute.

An automobile on a through highway is approaching an intersection when it is so close to the intersection that, considering the rate of speed at which it is traveling, it would be reasonable to assume that a collision would occur if the automobile which stopped, as required, before entry onto the through highway moves onto the highway and into the path of the oncoming vehicle.

If you find that the oncoming automobile on the through highway had entered the intersection, or was approaching it as here defined, it then became the duty of the driver entering the through highway to yield the right of way to the automobile on the through highway.

COMMENT

This instruction and comment were originally published in 1966. The instruction was revised in 2008. The comment was revised in 1983.

The first and second paragraphs refer, respectively, to Wis. Stat. §§ 346.18(3) and 340.01(51).

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Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

This instruction is based on the assumption that there is no issue on the record about one highway being a through highway, as defined by Wis. Stat. § 340.01(67). If, however, an issue develops as to whether the highway in question is a through highway, then a preliminary question would be required and would be covered by an instruction giving the statutory definition.

Although the law in Wisconsin gives the driver on a through highway a preference, such preference is not absolute. Leckwee v. Gibson, 90 Wis.2d 275, 280 N.W.2d 186 (1979). In Leckwee, the court, citing prior decisions, stated:

> It is clear that:
>
> . . . while one may have the right-of-way and may presume others will respect it, he may nevertheless be negligent in respect to management and control if his right-of-way is not respected and he does not do what he can do to prevent the accident. Chille v. Howell (1967), 34 Wis.2d 491, 497, 149 N.W.2d 600. Tombal v. Farmers Ins. Exchange, 62 Wis.2d 64, 69, 214 N.W.2d 291 (1974).
>
> The operator of an automobile having the right of way on an arterial highway must still maintain a proper lookout. Having the right of way does not relieve one of the duty of watching the road for vehicles on the highway or entering thereon. Puhl v. Milwaukee Automobile Ins. Co., 8 Wis.2d 343, 348, 99 N.W.2d 163 (1959).

The former version of the comment to this instruction included an optional paragraph based on Ogle v. Avina, 33 Wis.2d 125, 146 N.W.2d 422 (1966). This optional paragraph expressed a view which held that a "special dignity" was to be afforded to a driver traveling on an arterial. The optional portion stated that the right of way of the driver on the through highway meant "not only the right to the immediate use of the roadway; but the enjoyment of such right without being required to brake one's rate of speed or divert one's course to the right or left."

Because of the contrary holdings in Leckwee and cases cited by the court in Leckwee which refused to extend an absolute preference to a driver on a through highway, the optional paragraph is withdrawn.

Where the issue is presented as to the negligence of the driver on a through highway with respect to management and control or lookout, see Wis JI-Civil 1030, 1090, 1190, and 1191.

Wis. Stat. § 346.18(3) is the stopping statute referred to in the first paragraph. If stopping is at issue, it would be covered by a separate question and by Wis JI-Civil 1325.

In regard to the duty to look and to calculate, see Plog v. Zolper, 1 Wis.2d 517, 85 N.W.2d 492 (1957).

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1155 RIGHT OF WAY: AT INTERSECTIONS OF HIGHWAYS

A safety statute provides that when two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right. The statute does not make the right of way on the part of the vehicle on the right depend on whether it reaches or begins to enter the intersection first.

The statutes define "right of way" as the privilege of the immediate use of the roadway.

The phrase "approach or enter an intersection at approximately the same time" means the approach or entry of two vehicles toward or into the intersection so nearly at the same time that there is imminent danger of a collision if both vehicles continue their same courses at their same speeds.

If you find that the automobiles in question approached or entered the intersection at approximately the same time, then it became the duty of (the driver of the automobile on the left) to yield the right of way to the automobile on the right. This duty compelled (driver) either to stop the automobile, if necessary, or to control and manage it so that (he) (she) could yield the right of way to the vehicle within the zone of danger on the right and avoid colliding with it.

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2002 and 2008.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

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The first and second paragraphs refer, respectively, to Wis. Stat. § 346.18(1) and § 340.01(51).

The question of right of way is to be answered only in the event the driver of the vehicle on the right is not negligent with respect to speed. The last sentence of Wis. Stat. § 346.18(1) provides that, "The operator of any vehicle driving at an unlawful speed forfeits any right of way which he would otherwise have under this subsection."

This instruction is based on the language adopted in the case of Home Fire & Marine Ins. Co. v. Farmers Mut. Auto Ins. Co., 274 Wis. 210, 214, 79 N.W.2d 834 (1956), and Kraskey v. Johnson, 266 Wis. 201, 206, 63 N.W.2d 112 (1954), citing Vogel v. Vetting, 265 Wis. 19, 25, 60 N.W.2d 399 (1953). See also Nessler v. Nowicki, 12 Wis.2d 421, 425, 107 N.W.2d 616 (1961).

It is recommended that the verdict contain a direction to the jury that they should first consider the question of speed on the part of the driver who has the geographical right of way before the right of way of the competing driver is considered. See Burkhalter v. Hartford Accident & Indem. Ins. Co., 268 Wis. 385, 388, 68 N.W.2d 2 (1955); Leonard v. Employers Mut. Liab. Ins. Co., 265 Wis. 464, 468, 62 N.W.2d 10 (1953); Johnson v. Fireman's Fund Indem. Co., 264 Wis. 358, 361, 59 N.W.2d 660 (1953).

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1157 RIGHT OF WAY: AT INTERSECTION OF HIGHWAYS; ULTIMATE VERDICT QUESTION

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.

The statutes further provide that when two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right. The statute does not make the right of way on the part of the vehicle on the right depend on whether it reaches or begins to enter the intersection first.

The phrase "approach or enter an intersection at approximately the same time" means the approach or entry of two vehicles toward or into the intersection so nearly at the same time that there is imminent danger of a collision if both vehicles continue their same courses at their same speeds.

If you find that the automobiles in question approached or entered the intersection at approximately the same time, then it became the duty of the driver of the automobile on the left to yield the right of way to the automobile on the right. This duty compelled the driver either to stop the driver's automobile, if necessary, or to control and manage it so that the driver could yield the right of way to the vehicle within the zone of danger on the driver's right and avoid colliding with it.

Another safety statute provides that the driver of any vehicle operating at an unlawful speed on a highway is negligent and forfeits any right of way which he would otherwise have. Thus, before you can find negligence for failure to yield the right of way, you must first find that the vehicle on the right was being driven at a lawful speed.

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COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 1992 and 2008.

Wis. Stat. §§ 340.01(51) and 346.18(1); Baier v. Farmers Mut. Auto Ins. Co., 8 Wis.2d 506, 99 N.W.2d 709 (1959); Van Wie v. Hill, 15 Wis.2d 98, 103, 105, 112 N.W.2d 168 (1961).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

Speed. Speed need not be causal to deprive a driver of his statutory right of way. Van Wie v. Hill, supra.

Home Fire & Marine Ins. Co. v. Farmers Mut. Auto Ins. Co., 274 Wis. 210, 79 N.W.2d 834 (1956).

Kraskey v. Johnson, 266 Wis. 201, 63 N.W.2d 112 (1954).

Nessler v. Nowicki, 12 Wis.2d 421, 107 N.W.2d 616 (1961).

Burkhalter v. Hartford Accident & Indem. Ins. Co., 268 Wis. 385, 68 N.W.2d 2 (1955).

Leonard v. Employers Mut. Liab. Ins. Co., 265 Wis. 464, 62 N.W.2d 10 (1953).

Paragraph 5 should not be used unless, under the evidence, the right-hand driver can be found negligent as to speed. "Unlawful speed" mentioned in paragraph 5 is defined in Wis JI-Civil 1285. See Drake v. Farmers Mut. Auto Ins. Co., 22 Wis.2d 56, 125 N.W.2d 391 (1963).

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1158 RIGHT OF WAY: TO PEDESTRIAN CROSSING AT CONTROLLED INTERSECTION

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.

The statutes further provide that at an intersection or crosswalk where traffic is controlled by (traffic control signals) (a traffic officer), the driver of a vehicle shall yield the right of way to a pedestrian crossing or who has started to cross the highway on a green or 'WALK' signal.

If you find that (pedestrian) was crossing or had started to cross the highway (at the direction of a traffic officer) (with the green or 'WALK' signal in his or her favor), it became the duty of (driver) to yield the right of way to (pedestrian).

COMMENT

This instruction and comment were approved in 1977. Editorial changes were made in 1992 to address gender references in the instruction. The comment was reviewed without change in 2008.

Wis. Stat. §§ 340.01(51), 346.23(1). Schoehauer v. Wendinger, 49 Wis.2d 415, 182 N.W.2d 441 (1971).

If the highway is a divided highway or contains safety zones, use Wis JI-Civil 1160.

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1159 RIGHT OF WAY: PEDESTRIAN CONTROL SIGNAL: WALK SIGNAL

Question _ asks whether (name) failed to yield the right of way to (name).

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.

The statutes further provide that, "A pedestrian facing a 'Walk' signal may proceed across the roadway in the direction of the signal and shall be given the right of way by the operators of all vehicles."

If you find that (pedestrian) faced a 'Walk' signal and was proceeding across the roadway in the direction of the signal, then it became the duty of (name) to yield the right of way to (pedestrian).

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The second and third paragraphs refer, respectively, to Wis. Stat. §§ 340.01(51) and 346.38(1).

The pedestrian also retains the right of way if he or she has partially completed his or her walk to the far curb or to a safety island when the light changes to "Wait" or "Don't Walk." Wis. Stat. § 346.38(2).

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1160 RIGHT OF WAY: TO PEDESTRIAN AT INTERSECTIONS OR CROSSWALKS ON DIVIDED HIGHWAYS OR HIGHWAYS PROVIDED WITH SAFETY ZONES

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.

In a divided highway, the term "roadway" refers to each roadway separately but not to all the roadways collectively.

The statutes further provide that at intersections or crosswalks on divided highways or highways provided with safety zones where traffic is controlled by traffic control signals or by a traffic officer, the driver of a vehicle shall yield the right of way to a pedestrian who (is crossing or) has started to cross the roadway either from the near curb or shoulder or from the center dividing strip or safety zone with the green or "WALK" signal in his or her favor.

Divided highway is defined as a highway with two or more roadways separated by spaces not intended for the use of vehicular traffic.

The term “safety zone” means the area or space officially set apart within a roadway for the exclusive use of pedestrians, including those about to board or alighting from public conveyances, and which is protected or is so marked or indicated by adequate signs as to be plainly visible at all times while set apart as a safety zone.

If you find that (pedestrian) (was crossing or) had started to cross the roadway either from the near curb or shoulder or from the center dividing strip or safety zone (at the direction of a traffic officer) (with the green or "WALK" signal in (his) (her) favor), then it became the duty of (the driver of the automobile) to yield the right of way to (pedestrian).

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COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first paragraph is from Wis. Stat. § 340.01(51).

The second and third paragraphs refer, respectively, to Wis. Stat. §§ 340.01(54) and 346.23(2).

The fourth and fifth paragraphs refer, respectively, to Wis. Stat. § 340.01(15) and 340.01(55).

If the facts warrant it, the court should instruct that the pedestrian no longer enjoys the right of way over an automobile if the signal turns against the pedestrian before the pedestrian leaves the center dividing space or safety zone. If that occurs, the right of way belongs to the vehicle lawfully proceeding directly ahead on a green or "GO" signal. Wis. Stat. § 346.23(2).

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1161 RIGHT OF WAY: PEDESTRIAN CROSSING ROADWAY AT POINT OTHER THAN CROSSWALK

COMMENT

This reference instruction was added in 1981.

(See Wis JI-Civil 1230.)

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1165 RIGHT OF WAY: TO PEDESTRIAN AT UNCONTROLLED INTERSECTION OR CROSSWALK

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.

The statutes further provide that, at an intersection or crosswalk where traffic is not controlled by traffic control signals or by a traffic officer, the driver of a vehicle shall yield the right of way to a pedestrian who is crossing the roadway within a marked or unmarked crosswalk.

(A marked crosswalk is any portion of a roadway clearly indicated for pedestrian crossing by signs, lines, or other markings on the surface of the roadway.)

(An unmarked crosswalk is formed by extending imaginary lines the width of the sidewalk at an intersection, across the roadway, to the sidewalk on the opposite side of the intersection.)

(If there is a sidewalk on only one side of an intersection, an unmarked crosswalk is formed by extending imaginary lines the width of the sidewalk, at right angles to the centerline of the roadway, to the opposite side of the intersection.)

If you find that (plaintiff) was crossing the roadway within a (marked) (unmarked) crosswalk, then it became the duty of (defendant) to yield the right of way to (plaintiff). If, however, you find that (plaintiff) was crossing the roadway and was not within a (marked) (unmarked) crosswalk, then it became (plaintiff)'s duty to yield the right of way to (defendant).

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COMMENT

This instruction was approved in 1978 and revised in 1989. The instruction was reviewed without change in 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first and second paragraphs refer, respectively, to Wis. Stat. §§ 340.01(51) and 346.24(1). The appropriate statutory definition of "marked" or "unmarked" crosswalk should be given. Definitions are found in Wis. Stat. § 340.01(10)(a) or (b). There may be marked crosswalks at places other than intersections.

Burke v. Tesmer, 224 Wis. 667, 670-71, 272 N.W. 857 (1937), indicates that there are no unmarked crosswalks at intersections in the country where there are no sidewalks and that a pedestrian crossing at such an intersection is under a duty to yield the right of way to a car on the highway. Wis. Stat. § 346.24(2) is a statutory admonition to pedestrians not to suddenly leave a curb or other place of safety and walk or run into the path of a vehicle.

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1170 RIGHT OF WAY: BLIND PEDESTRIAN ON HIGHWAY

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.

The statutes further provide that a driver of a vehicle must stop the vehicle before approaching closer than 10 feet to a pedestrian carrying a cane or walking stick which is white in color or white trimmed with red and which is held in an extended or raised position and shall take such precautions as may be necessary to avoid accident or injury to the pedestrian. The fact that the pedestrian may be violating any of the laws applicable to pedestrians does not relieve the driver of a vehicle from the duties imposed by the rule just stated.

If you find that (pedestrian) was carrying a cane or walking stick identified by the specified colors and extended or raised in position, then it became the duty of (driver) of the vehicle to stop the vehicle before approaching closer than 10 feet to (him) (her) and to take such precautions as might be necessary to avoid accident or injury to the pedestrian.

COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first and second paragraphs refer, respectively, to Wis. Stat. §§ 340.01(51) and 346.26(1).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

A blind person unidentified by cane or walking stick enjoys the rights of other pedestrians in crossing highways. Wis. Stat. § 346.26(2).

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1175 RIGHT OF WAY: ENTERING HIGHWAY FROM AN ALLEY OR NONHIGHWAY ACCESS POINT

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.

The statutes further provide that the driver of a vehicle entering a highway from an alley or from a point of access other than another highway shall yield the right of way to all vehicles approaching on the highway which the driver is entering.

The word "entering" means going or moving into.

The phrase "point of access" means a place where an entry can be made onto a highway.

An automobile is said to be approaching the point where the entry on a highway is to be made when it is not so far distant the entry point that, considering the rate of speed at which it is traveling, it would be reasonable to assume that a collision would occur if the driver of the automobile intending to enter the highway undertakes to do so and drives an automobile across or into the path of the oncoming automobile.

If you find that the automobile on the highway was approaching the place where the entry onto the highway was to be made, then it became the duty of the driver entering the highway to yield the right of way to the automobile on the highway.

COMMENT

The instruction and comment were originally published in 1960. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Wis. Stat. §§ 340.01(51) and 346.18(4).

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Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

If there is need for a definition of "alley," see Wis. Stat. § 340.01(2).

Plog v. Zolper, 1 Wis.2d 517, 525-29, 85 N.W.2d 492, 498-99 (1957).

The negligence of one using excessive speed on an arterial does not excuse one approaching the arterial for not yielding the right of way. Ogle v. Avina, 33 Wis.2d 125, 132, 146 N.W.2d 422 (1966). One entering an arterial must be reasonably sure he or she can enter into the flow of traffic thereon without disrupting it. Ogle v. Avina, supra at 133. However, having the right of way does not relieve a driver of the duty of watching the road for vehicles entering onto the highway. Leckwee v. Gibson, 90 Wis.2d 275, 287, 280 N.W.2d 186 (1979).

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1180 RIGHT OF WAY: FUNERAL PROCESSIONS; MILITARY CONVOYS

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.

The statutes further provide that, "(Funeral processions) ([M]ilitary convoys) have the right of way at intersections when vehicles comprising such procession have their bright headlights lighted. . . ."

[Note: The preceding paragraph may be subject to certain conditions and exceptions in Wis. Stat. § 346.20(4)(a), (b), or (c). Conclude the paragraph with the statement of the law as to the applicable condition or exception.]

COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 2008.

The first and second paragraphs refer, respectively, to Wis. Stat. §§ 340.01(51) and 346.20(1).

This instruction is prepared solely as a suggested general pattern. It can be adapted to fit the particular need of any given situation.

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1185 RIGHT OF WAY: GREEN ARROW

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.

The statutes further provide that vehicular traffic facing a green arrow signal may enter the intersection only to make the movement indicated by the arrow but shall yield the right of way to pedestrians lawfully within a crosswalk and to other traffic lawfully using the intersection.

["Vehicular traffic," includes any device in, upon, or by which persons or property may be transported or drawn upon a highway. The term includes (bicycles) (_____).]

If you find that (_____) faced a green arrow signal before entry into the intersection, then it became (_____)'s duty to yield the right of way (to pedestrians lawfully within a crosswalk at the intersection) (to other traffic lawfully using the intersection).

COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first and second paragraphs refer, respectively, to Wis. Stat. §§ 340.01(51) and 346.37(1)(d).

The blank in the third paragraph is for the inclusion of other vehicles about which the jury may be in doubt. Wis. Stat. § 340.01(74) has a specific mention of snowmobiles.

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1190 RIGHT OF WAY: GREEN SIGNAL

The Wisconsin statues define "right of way" as the privilege of the immediate use of the roadway.

The statutes further provide that vehicular traffic facing a green signal may proceed straight through or turn right or left unless a sign at the place prohibits either turn, but vehicular traffic shall yield the right of way to other vehicles and to pedestrians lawfully within the intersection or an adjacent crosswalk at the time the signal is exhibited.

"Vehicular traffic," includes any device in, upon, or by which persons or property may be transported or drawn upon a highway. The term includes (bicycles) (_____).

"Adjacent" means near, close, or adjoining. As here used, it refers to (the crosswalk the driver of the vehicle will be compelled to cross if the driver moves straight ahead) (the crosswalk the driver will be compelled to cross on the intersecting street if the driver turns right or left).

COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first and second paragraphs refer respectively to Wis. Stat. §§ 340.01(51) and 346.37(1)(a).

The blank in the third paragraph is for the inclusion of other vehicles about which the jury may be in doubt. Wis. Stat. § 340.01(74) has a specific mention of snowmobiles.

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1190.5 PLAINTIFF AND DEFENDANT EACH CLAIMS GREEN LIGHT IN THEIR FAVOR

Both drivers claim that the green traffic light (or "Go" signal) was facing them as they proceeded to cross the intersection in question. It was a physical impossibility for this to happen, in the absence of evidence that the lights were not in good working order. It is for you to determine which driver the green light was facing and which driver, at that same time, the red light was facing as each driver proceeded into the intersection.

COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Matthews v. Schuh, 5 Wis.2d 521, 526, 93 N.W.2d 364 (1958).

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1191 DUTY OF DRIVER ENTERING INTERSECTION WITH GREEN LIGHT IN DRIVER'S FAVOR: LOOKOUT

A driver entering an intersection with the light in his or her favor does not have an absolute right of way. The driver, when entering the intersection, has the duty of maintaining an efficient lookout to determine the presence of other vehicles approaching his or her course of travel and must also exercise reasonable judgment in calculating the distance and speed of any approaching vehicles so as to determine whether such approaching vehicle will run the light. If after such lookout and calculation it is apparent that the approaching vehicle is going to run the light, then the driver having the light in his or her favor must exercise ordinary care in an attempt to avoid a collision.

If the driver entering the intersection with the light in his or her favor properly determined that any automobile approaching the intersection was traveling at such speed and was at such distance from the intersection that the approaching driver could, as a matter of physical fact, yield the right of way if the driver responded to the red light, then the driver with lights in his or her favor, after entering the intersection, need not make continuing observations to either side for approaching traffic.

COMMENT

The instruction and comment were originally published in 1972. The instruction was reviewed without change in 2008. The comment was updated in 2008. Editorial changes were made in 1992 to address gender references in the instruction.

See Wis JI-Civil 1190, Right of Way: Green Signal; Wis JI-Civil 1030, Right to Assume Due Care; and Wis JI-Civil 1090, Driver at Arterial Approaching Intersection: Lookout; Right of Way; Flashing Yellow Signal.

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Hardware Dealers Mut. Fire Ins. Co. v. Home Mut. Ins. Co., 24 Wis.2d 381, 129 N.W.2d 214 (1964); Oelke v. Earle, 271 Wis. 479, 74 N.W.2d 336 (1956); Wilson v. Koch, 241 Wis. 594, 6 N.W.2d 659 (1942); Gleason v. Gillihan, 32 Wis.2d 50, 55, 145 N.W.2d 90 (1966).

When approaching a green light, if a driver's view of traffic approaching on the intersection road is obstructed, the driver has a duty to make further observation at a point which will enable the driver to take effective steps to avoid a collision. Oelke v. Earle, supra at 483. But seeBattice v. Michaelis, 255 Wis. 571, 576, 39 N.W.2d 702 (1949).

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1192 DUTY OF DRIVER APPROACHING INTERSECTION WHEN AMBER LIGHT SHOWS

A safety statute provides that a driver facing a yellow signal shown with or following a green light, shall stop before entering the intersection unless so close to it that a stop cannot be made in safety.

If you find that the yellow or amber light, which signifies caution, was showing before (_____) entered the intersection, then (_____) was required to stop unless (he) (she) was so close to the traffic signal that a stop could not be made in safety.

COMMENT

The instruction and comment were originally published in their present form in 1966. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Wis. Stat. § 346.37(1)(b).

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1193 RED TRAFFIC CONTROL LIGHT SIGNALLING STOP

A safety statute provides that vehicles facing a red traffic light shall stop before entering the crosswalk on the near side of an intersection, or, if there is no crosswalk, at a point indicated by a clearly visible sign or other marking, or if there is no sign or marking, before entering the intersection, and shall remain standing until a green light or other signal permitting movement is shown.

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2008.

Wis. Stat. § 346.37(1)(c).

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1193.5 FLASHING RED TRAFFIC CONTROL LIGHT

When a red traffic control light is illuminated with rapid intermittent flashes, drivers of vehicles shall stop before entering the intersection at the nearest crosswalk or at a limit line if marked, or, if there is no crosswalk or limit line, then before entering the intersection; the right to proceed is subject to the rules applicable after making a stop at a stop sign.

[Here add appropriate parts of Wis JI-Civil 1325 Stop at Stop Signs.]

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2008.

Wis. Stat. § 346.39(1).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

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1195 RIGHT OF WAY: LEFT TURN AT INTERSECTION

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that the driver of a vehicle within an intersection intending to turn to the left across the path of any vehicle approaching from the opposite direction shall yield the right of way to that vehicle.

The word "approaching" involves a concept of nearness in space and time. An automobile is approaching an intersection when it is not so far distant from the intersection that, considering the speed at which it is traveling, it is reasonable to assume that a collision will occur if the driver of the automobile intending to turn left undertakes to do so by changing the course of the automobile from the right lane, across the center line, and into the path of the oncoming automobile.

If you find that the oncoming automobile was approaching the intersection, it became the duty of the driver turning left to yield the right of way to the approaching automobile.

COMMENT

The instruction and comment were originally published in their present form in 1967. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.18(2).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

Wis. Stat. § 346.18(7) provides: "The operator of any vehicle intending to turn to the left into an alley or private driveway across the path of any vehicle approaching from the opposite direction shall yield the right of way to such vehicle." Thus this statute does impose a duty on the left-turning driver independent of lookout. Zartner v. Scopp, 28 Wis.2d 205, 216, 137 N.W.2d 107 (1965).

For the definition of "intersection," see Wis. Stat. § 340.01(25).

See Plog v. Zolper, 1 Wis.2d 517, 529, 85 N.W.2d 492 (1957).

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1200 RIGHT OF WAY: LIVESTOCK

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that the driver of a motor vehicle must yield the right of way to livestock being driven over or along any highway. (But any person in charge of such livestock must use reasonable care and diligence to open the roadway for vehicular traffic.)

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 2008. The comment was updated in 2008.

The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.21.

Note that Wis. Stat. § 346.21 imposes duties on the person in charge of the livestock as well as the operator of the motor vehicle. The committee does not believe that the duty of the driver to yield the right of way is lessened or made dependent on the care exercised by the person in charge of the livestock to use reasonable care and diligence. It may well be that the duty to yield is absolute. The duty imposed on the person in charge of the livestock may require a separate negligence question for a comparison of causal negligences.

For an instruction describing "reasonable care" and "diligence," see Wis JI-Civil 1005, Negligence Defined, and Wis JI-Civil 1010, Negligence of Children.

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1205 RIGHT OF WAY: MOVING FROM PARKED POSITION

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that the driver of any vehicle that has been parked or standing shall, while moving the vehicle from its position, yield the right of way to all vehicles approaching on the highway.

An automobile is said to be "approaching" when it is not so far distant that, considering the rate of speed at which it is traveling, it would be reasonable to assume that a collision would occur if the automobile parked or standing is put in motion and moved onto the roadway and into the path of the oncoming automobile.

If you find that the oncoming automobile on the highway was approaching, then it became the duty of the driver of the parked or standing automobile, while moving it from its position, to yield the right of way to an automobile approaching on the highway.

COMMENT

The instruction and comment were originally published in their present form in 1960 and revised in 2008.

The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.18(5).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

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1210 RIGHT OF WAY: ON APPROACH OF EMERGENCY VEHICLE

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that upon the approach of any authorized emergency vehicle giving audible signal by siren, the driver of a vehicle shall yield the right of way and shall immediately drive the vehicle to a position as near as possible and parallel to the right curb or to the right-hand edge of the shoulder of the roadway, clear of any intersection and, unless otherwise directed by a traffic officer, shall stop and remain standing in such position until the authorized emergency vehicle has passed.

[The (type of vehicle) was an emergency vehicle, as defined in the statutes.]

[Note: In the alternative, the language of Wis. Stat. § 340.01(3)(a), (b), (c), (d), (e), (f), or (g) may appropriately be used in defining "emergency vehicle."]

"Audible" means capable of being heard.

"Roadway" means that portion of a highway between the regularly established curb lines or that portion which is improved, designed or ordinarily used for vehicular travel.

If you find that the emergency automobile of (name) was approaching, giving audible signal by siren, then it became the duty of (name) to yield the right of way.

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 2008. An editorial correction was made in 1996.

The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.19(1).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

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The definition of "audible" is its common meaning. "Roadway" is defined in Wis. Stat. § 340.01(54).

As to "audible signal," see Frankland v. Peterson, 268 Wis. 394, 397, 67 N.W.2d 865, 866 (1955); Swinkles v. Wisconsin Michigan Power Co., 221 Wis. 280, 287-88, 267 N.W. 1, 4-5 (1936).

If the fact of hearing the signal is in issue, and the evidence warrants, it may be desirable to expand the definition of "audible" to cover a siren in good operating condition, and a reasonably attentive vehicle operator or pedestrian. The operator giving the signal need not show that the signal was actually heard by the operator. Werner Trans. Co. v. Zimmerman, 201 F.2d 687, 691 (1953). Testimony that the signal was not heard may be negative testimony and may require an instruction on the value of such testimony. Anderson v. Stricker, 266 Wis. 1, 5-6, 62 N.W.2d 396, 398 (1953); Hunter v. Sirianni Candy Co., 233 Wis. 130, 132-33, 288 N.W. 766, 769 (1939); Zenner v. Chicago, St. P., M. & O. Ry., 219 Wis. 124, 126-27, 262 N.W.2d 581, 582-83 (1935). See Wis JI-Civil 315, Negative Testimony.

This instruction is based on the assumption that there is no issue on the emergency nature of the vehicle involved. If this issue develops, it may require a separate preliminary question with an instruction defining emergency vehicles.

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1220 RIGHT OF WAY: PEDESTRIAN'S DUTY: AT PEDESTRIAN CONTROL SIGNAL

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that no pedestrian may start to cross the roadway (or other vehicular crossing) in the direction of a "Don't Walk" signal, but a pedestrian who has partially completed crossing on the "Walk" signal may proceed to a sidewalk or safety island while the "Don't Walk" signal is showing.

If you find that (pedestrian) was facing a "Don't Walk" signal, then it was (pedestrian)'s duty before entering into the roadway to yield the right of way to an approaching vehicle on the roadway. If, however, you find that (pedestrian) started to cross the roadway on a "Walk" signal and had partially completed crossing when the signal turned to "Don't Walk," then (pedestrian) had the right to proceed to the (sidewalk) (safety island).

COMMENT

The instruction and comment were originally published in 1960. The comment was updated in 1989. Editorial changes were made in 1992 to address gender references in the instruction. The instruction was revised in 1992 and 2008.

The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.38(2). See City of Hartford v. Godfrey, 92 Wis.2d 815, 286 N.W.2d 10 (Ct. App. 1979); Schoenauer v. Wendinger, 49 Wis.2d 415, 182 N.W.2d 441 (1971).

"Roadway" is defined in Wis. Stat. § 340.01(54).

See Sub. (1) of § 346.38 giving the pedestrian the right of way if on a "walk" signal.

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1225 RIGHT OF WAY: PEDESTRIAN'S DUTY: CROSSING AT CONTROLLED INTERSECTION OR CROSSWALK

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that at an intersection or crosswalk where traffic is controlled by traffic control signals or by a traffic officer, the driver of a vehicle shall yield the right of way to a pedestrian who has started to cross the highway on a green or "Walk" signal and in all other cases pedestrians shall yield the right of way to vehicles lawfully proceeding directly ahead on a green signal.

If you find that at (intersection), where traffic was controlled by (traffic control signals) (a traffic officer), (pedestrian) was in the act of crossing the highway on the (green) (Walk) signal, then (pedestrian) was entitled to the right of way over an approaching automobile. However, if you find that (pedestrian) was not crossing or had not started to cross the highway on a (green) (Walk) signal, then it became (pedestrian)'s duty to yield the right of way to an approaching automobile on the highway proceeding directly ahead on the (green) signal.

COMMENT

The instruction and comment were originally published in their present form in 1972. This comment was updated in 1989 and 2008. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.23(1). See City of Hartford v. Godfrey, 92 Wis.2d 815, 286 N.W.2d 10 (Ct. App. 1979); Schoenauer v. Wendinger, 49 Wis.2d 415, 182 N.W.2d 441 (1971).

For the definition of "intersection," see Wis. Stat. § 340.01(25); for "traffic control signal," see § 340.01(39); for "pedestrian," see 340.01(43); and for "crosswalk," see § 340.01(10)(a) and (b).

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For the right of way at intersections or crosswalks on divided highways or highway provided with safety zones, see Wis. Stat. § 346.23(2).

An instruction defining "crosswalk" was approved in Van Galder v. Snyder, 254 Wis. 120, 123, 35 N.W.2d 187, 188-89 (1948). The changing of a light does not justify an operator of an automobile to move forward until a reasonable opportunity is given to the pedestrian to reach the sidewalk. Raaber v. Brzoskowski, 204 Wis. 319, 321, 236 N.W. 133, 134 (1931).

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1230 RIGHT OF WAY: PEDESTRIAN'S DUTY: CROSSING ROADWAY AT POINT OTHER THAN CROSSWALK

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that a pedestrian crossing a roadway at any point other than within a marked or unmarked crosswalk shall yield the right of way to all vehicles upon the roadway.

If you find that (pedestrian) was crossing the roadway at a point other than a marked or unmarked crosswalk, then it became (pedestrian)'s duty to yield the right of way to an automobile approaching on the roadway.

COMMENT

The instruction and comment were originally published in their present form in 1972. The comment was updated in 1989. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.25. Also see the notes to these sections in Wis. Stat. Annot.

For the definition of "roadway," see Wis. Stat. § 340.01(54); for "marked" or "unmarked crosswalk," see § 340.01(10)(a) and (b).

Wis. Stat. § 891.44 provides an exception to § 346.25, and this instruction is not to be given when the pedestrian is a child under 7 years of age. Thoreson v. Milwaukee & Suburban Transp. Corp., 56 Wis.2d 231, 201 N.W.2d 745 (1972).

The duty of a pedestrian to yield the right of way under Wis. Stat. § 346.25 is absolute, regardless of any negligence on the part of the driver. Failure to yield is causal negligence as a matter of law. Field v. Vinograd, 10 Wis.2d 500, 505, 103 N.W.2d 671 (1960); Staples v. Glienke, 142 Wis.2d 19, 416 N.W.2d 920 (Ct. App. 1987).

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1235 RIGHT OF WAY: PEDESTRIAN'S DUTY: DIVIDED HIGHWAYS OR HIGHWAYS WITH SAFETY ZONES

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that at intersections or crosswalks on divided highways or highways provided with safety zones where traffic is controlled by traffic control signals or by a traffic officer, the driver of a vehicle shall yield the right of way to a pedestrian who has started to cross the roadway either from the near curb or shoulder or from the center dividing strip or safety zone with the green or "Walk" signal in his or her favor. If the signal turns against a pedestrian before the pedestrian leaves the center dividing space or safety island, the pedestrian shall yield the right of way to vehicles lawfully proceeding directly ahead on a green signal.

If you find that at (intersection on a divided highway), where traffic was controlled by traffic control signals, (pedestrian) was in the act of crossing the roadway from the near curb or shoulder with the (green) (Walk) signal in (his) (her) favor, then (pedestrian) was entitled to the right of way over an approaching automobile. However, if you find that the signal turned against (pedestrian) before (he) (she) left the center dividing space or safety island, then it was (pedestrian)'s duty to yield the right of way to a vehicle on the roadway lawfully proceeding directly ahead on the (green) signal.

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

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The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.23(2).

For the definition of specific words and phrases, see Wis. Stat. § 340.01.

The instruction should be changed to accommodate it to the factual situation, as to crosswalk, or divided highway, or highways provided with safety zones, or if traffic is controlled by a traffic officer.

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1240 RIGHT OF WAY: PEDESTRIAN'S DUTY: FACING GREEN ARROW

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that no pedestrian facing a green arrow signal shall enter the roadway unless the pedestrian can do so safely and without interfering with any vehicular traffic.

If you find that (pedestrian) was facing a green arrow, then it became (pedestrian)'s duty, before entering onto the roadway, to yield the right of way to an approaching vehicle unless (pedestrian) could enter the roadway safely and without interference with vehicle traffic on the roadway.

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.37(1)(d)(2).

"Roadway" is defined in Wis. Stat. § 340.01(54).

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1245 RIGHT OF WAY: PEDESTRIAN'S DUTY: FACING RED SIGNAL

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that no pedestrian facing a red signal shall enter the roadway unless the pedestrian can do so safely and without interfering with any vehicular traffic.

If you find that (pedestrian) was facing a red signal, then it was (pedestrian)'s duty before entering onto the highway to yield the right of way to an approaching vehicle unless (he) (she) could enter the roadway safely and without interference with traffic on the roadway.

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.37(1)(c)(2).

"Roadway" is defined in Wis. Stat. § 340.01(54).

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1250 RIGHT OF WAY: PEDESTRIAN'S DUTY: STANDING OR LOITERING ON HIGHWAY

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that no person shall be on a roadway for the purpose of soliciting a ride from the driver of any vehicle other than a public passenger vehicle.

If you find that (pedestrian) was on the roadway for the purpose of soliciting a ride from the driver of any vehicle other than a public passenger vehicle, then it was (pedestrian)'s duty to yield the right of way to a vehicle approaching on the roadway.

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.29(1).

The instruction should be changed to accommodate it to the factual situation if the pedestrian is loitering on the roadway, as prohibited by Wis. Stat. § 346.29(2), or if the pedestrian is on a bridge, or approach thereto, to fish or swim, in violation of signs prohibiting his or her presence thereon for such purpose, as prohibited by subsection (3).

"Roadway" is defined in Wis. Stat. § 340.01(54).

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1255 RIGHT OF WAY: PEDESTRIAN'S DUTY AT UNCONTROLLED INTERSECTION OR CROSSWALK; SUDDENLY LEAVING CURB OR PLACE OF SAFETY

A safety statute provides that at an intersection or crosswalk where traffic is not controlled by traffic control signals or by a traffic officer, the driver of a vehicle shall yield the right of way to a pedestrian who is crossing the highway within a marked or unmarked crosswalk.

"Right of way" means the privilege of the immediate use of the roadway.

The statute further provides that a pedestrian shall not suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is difficult for the driver of the vehicle to yield the right of way.

If you find that (pedestrian) suddenly left the curb (or other place of safety) and walk or run into the path of (_____) vehicle which was so close that it was difficult for (_____) to yield, then (driver) did not have a duty to yield the right of way; but if you find that (pedestrian) did not enter the roadway, then it became the duty of (driver) to yield the right of way to (pedestrian).

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

Wis JI-Civil 1165 covers the duty of the motorist to yield the right of way to a pedestrian crossing an uncontrolled intersection within a crosswalk. Wis JI-Civil 1225 covers the right of way situation where

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the pedestrian crosses at a controlled intersection or crosswalk. Wis JI-Civil 1230 covers the duty of a pedestrian who crosses at a point other than a crosswalk.

This instruction covers the situation where the pedestrian is within the crosswalk but has darted into the street from a place of safety. Other combinations of pedestrian-motorist right of way situations can be handled in the manner suggested by this instruction.

Wis. Stat. §§ 340.01(51), 346.24(2).

Hintz v. Mielke, 15 Wis.2d 258, 263, 112 N.W.2d 720 (1961); Schoenauer v. Wendinger, 49 Wis.2d 415, 182 N.W.2d 441 (1971); Schueler v. City of Madison, 49 Wis.2d 695, 183 N.W.2d 116 (1971).

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1260 POSITION ON HIGHWAY: PEDESTRIAN'S DUTY; WALKING ON HIGHWAY

A safety statute provides that a pedestrian walking along and upon a highway other than a sidewalk shall walk on and along the left side of the highway and upon meeting a vehicle shall, if practicable, step to the extreme outer edge of the traveled portion of the highway. The traveled portion of the highway includes the shoulder.

If you find that (pedestrian) was on the left side of the highway as (he) (she) walked on and along it, then it became (pedestrian)'s duty upon meeting a vehicle, if it could be practicably done by (him) (her), to step to the extreme outer limits of the traveled portion of the highway.

COMMENT

This instruction and comment were approved in 1977. The comment was updated in 1989. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Wis. Stat. § 346.28(1).

Pedestrian walking on right side of highway is negligent as a matter of law. Panzer v. Hesse, 249 Wis. 340, 24 N.W.2d 613 (1946); Staples v. Glienke, 142 Wis.2d 19, 416 N.W.2d 920 (Ct. App. 1987).

The traveled portion of the highway includes the shoulder. Wojciechowski v. Baron, 274 Wis. 364, 80 N.W.2d 424 (1957).

The jury may find a pedestrian walking on the edge of the blacktop roadway not negligent. Dahl v. Ellis, 35 Wis.2d 441, 151 N.W.2d 61 (1967).

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1265 RIGHT OF WAY: PERSONS WORKING ON HIGHWAY

A safety statute provides that a driver of a vehicle shall yield the right of way to persons engaged in maintenance or construction work on a highway whenever the driver is notified of their presence by flagmen or warning signs.

"Right of way" means the privilege of the immediate use of the roadway.

If you find that (plaintiff) was engaged in maintenance or construction work on a highway at the time and place in question and that a flagman or warning signs were present to notify (defendant) of (plaintiff)'s presence and occupation, then it became the duty of (defendant) to yield the right of way to (plaintiff).

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first and second paragraphs refer, respectively, to Wis. Stat. §§ 346.27 and 340.01(51).

As to the lessened duty of care imposed on persons so engaged in highway construction, see Knowles v. Stargel, 261 Wis. 106, 109-10, 52 N.W.2d 387 (1952); Gunning v. King, 249 Wis. 176, 180-81, 23 N.W.2d 602 (1946); Isgro v. Plankington Packing Co., 176 Wis. 507, 514-16, 186 N.W. 606 (1922).

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1270 RIGHT OF WAY: WHEN VEHICLE USING ALLEY OR NONHIGHWAY ACCESS TO STOP

A safety statute provides that the driver of a vehicle emerging from an alley or about to cross or enter a highway from any point of access other than another highway shall stop the vehicle immediately prior to moving onto the sidewalk, or onto the sidewalk area extending across the path of the vehicle, and shall yield the right of way to any pedestrian, and upon crossing or entering the roadway shall yield the right of way to all vehicles approaching on the roadway.

"Right of way" means the privilege of the immediate use of the roadway.

The words "emerging from" mean "leaving or coming out of."

"Point of access," means "a place where an entry can be made onto a highway."

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2008.

The first and second paragraphs refer respectively to Wis. Stat. §§ 346.47(1) and 340.01(51).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

Wis. Stat. § 346.18(4) provides for yielding the right of way to vehicles approaching on the highway under these circumstances. Wis JI-Civil 1175 Right of Way: Entering Highway from an Alley or Non-Highway Access Point covers this situation.

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1275 RIGHT OF WAY: WHEN YIELD SIGN INSTALLED

A safety statute provides that the driver of a vehicle when approaching any intersection at which has been installed a yield right of way sign, shall yield the right of way to other vehicles which have entered the intersection from an intersecting highway or which are approaching so closely on the intersecting highway as to constitute a hazard of collision and, if necessary, shall reduce speed or stop to yield.

"Right of way" means the privilege of the immediate use of the roadway.

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2008.

The paragraphs refer, respectively, to Wis. Stat. §§ 346.18(6) and 340.01(51).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

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1277 SAFETY BELT: FAILURE TO USE

The automobile in which (plaintiff) was (driving) (a passenger) was equipped with safety belts. Question _____ asks whether (plaintiff) was negligent in failing to use an available safety belt. In answering this question, you must determine if the omission by (plaintiff) to use an available safety belt was a failure to exercise ordinary care for (his) (her) own safety.

If you determine that (plaintiff) was negligent in failing to use an available safety belt, you should answer question _____ which asks whether (plaintiff)'s failure to use the safety belt was a cause of (plaintiff)'s injuries.

If you determine that the failure to use a safety belt was a cause of (plaintiff)'s injuries, you should then determine what percentage of (plaintiff)'s total damages were caused by the failure to wear an available safety belt.

(Burden of Proof, Wis JI-Civil 200)

SPECIAL VERDICT

Question _____: At and just before the accident was (plaintiff) negligent in failing to wear an available safety belt?

Answer: _____
Yes or No

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Question _____: If you answer question _____ "yes," then answer this question:

Was such negligence a cause of (plaintiff)'s injuries?

Answer: _____
Yes or No

Question _____: If you answer question _____ "yes," then answer this question:

Assuming the total damages to be 100%, what percentage of (plaintiff)'s total damages was caused by the failure to wear an available safety belt?

Answer: _____%

COMMENT

This instruction was approved in 1985 and revised in 1988. The comment was revised in 1988, 1991, and 2002. The comment was updated in 2003, 2004, and 2009.

In 2003, the Wisconsin Supreme Court held that the Foley methodology, upon which this instruction and comment are based, still applies to safety belt negligence even though it applied a different methodology to safety helmet negligence. Stehlik v. Rhoads, 2002 WI 73, 253 Wis.2d 477, 645 N.W.2d 73; Hardy v. Hoefferle, 2007 WI 264, 306 Wis.2d 513, 743 N.W.2d 843. For helmet negligence, see JI-Civil 1278.

Expert Testimony. This instruction should not be used unless there is evidence before the jury that the plaintiff's injuries were caused by his or her failure to use an available safety belt. Expert testimony is necessary to establish how the plaintiff's failure to wear a safety belt affected the plaintiff's injuries. In Holbach v. Classified Ins. Corp., 155 Wis.2d 412, 455 N.W.2d 260 (Ct. App. 1990), the court of appeals said expert testimony is always required to establish a seatbelt defense. The court relied on Austin v. Ford Motor Co., 86 Wis.2d 628, 642, 273 N.W.2d 233, 239 (1979), in which the supreme court said "the effect of seatbelts in accidents of a particular type at a particular speed is not a question of fact to be determined by the average juror without benefit of specialized knowledge in the form of expert testimony."

In Bentzler v. Braun, 34 Wis.2d 362, 387, 149 N.W.2d 626 (1967), the court held that although failure to wear seat belts is not negligence per se, "where seat belts are available and there is evidence before the jury indicating causal relationship between the injuries sustained and the failure to use seat belts, it is proper and necessary to instruct the jury in that regard."

This instruction and the suggested special verdict were drafted by the Committee so that safety belt negligence is treated as a reducing factor in determining recoverable damages. The court, in Foley v. City of West Allis, 113 Wis.2d 475, 335 N.W. 2d 824 (1983), said that the seat belt defense is "this court's

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recognition that . . . those who fail to use available seat belts should be held responsible for the incremental harm caused by their failure to wear available seat belts." Foley, supra at 484.

In Foley v. City of West Allis, supra at 478, the supreme court held that "when seat belt negligence is not a cause of the collision but is a cause of a party's injury, such negligence should not be used to determine the injured party's contributory negligence for purposes of Wis. Stat. § 895.045 but should be used only to reduce the amount of damages recoverable."

In explaining its decision, the court said that it is illogical and unnecessary to view "in a one-dimensional way" the negligence causing the collision together with the plaintiff's negligence in failing to use a seat belt. Instead, the court said it is helpful to think of the accident involving seat belt negligence as involving "not one incident but two." Foley, supra at 485. The first incident is the actual collision of the vehicles. The second incident occurs when an occupant of a vehicle hits the vehicle's interior. Seat belt negligence relates only to this second incident, and the failure to wear seat belts may cause additional injuries beyond those caused by the first incident.

The court, in Foley, emphasized that seat belt negligence is to be treated as a reducing factor and that damages for "the incremental injuries caused by the failure to use a seat belt can be treated separately for purposes of calculating recoverable damages." Foley, supra at 485. Requiring the jury to assess this incremental damage by apportioning damages between the first and second incidents borrows from the apportionment techniques used in two traditional tort doctrines: avoidable consequences and mitigation of damages. Through these doctrines, tort law recognizes that if a plaintiff does not minimize the harm, plaintiff's recovery will be reduced for damages which reasonably could be avoided. Foley, supra at 487.

In determining how seat belt negligence should specifically be applied to damage recovery, the court in Foley, supra at 489, stated:

> We should seek to treat the plaintiff and defendant in such a way that the plaintiff recovers damages from the defendant for the injuries that the defendant caused but that the defendant is not liable for incremental injuries that the plaintiff could and should have prevented by wearing an available seat belt.

After reviewing the special verdict formulated by the trial court, the court in Foley recommended that this Committee draft an instruction "which advises the jury that if it determines that the failure to wear a seat belt was a cause of a person's injuries, the jury must determine what percentage of the total damages for that person's personal injuries was caused by his or her failure to wear a seat belt." Foley, supra at 495. In a footnote to this recommendation, the court stated:

> If this type of instruction is given, the calculation set forth in steps (4) and (5) at p. 490 should reflect the percentage of damages attributable to the plaintiff's failure to wear an available seat belt rather than the percentage of causal negligence attributable to plaintiff's failure to wear the seat belt. 113 Wis.2d at 495 n.15.

Steps 4 and 5 cited in this footnote refer to the five-step process adopted by the court for determining recoverable damages. 113 Wis.2d at 490. In response to this recommendation, the Committee approved this instruction and the suggested special verdict.

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It has been suggested that seat belt negligence should instead be treated as a concurrent tort and that the seat belt negligence must be compared to the negligence of the accident as a whole in determining plaintiff's recovery. In support of this theory, reference is made to steps 4 and 5 of the five-step process adopted in Foley. The court said, with regard to steps 4 and 5, that the plaintiff's damages should be reduced by the percentage of total negligence attributable to plaintiff's seat belt negligence. Under this theory, the jury would first determine the amount of damages attributable to the seat belt negligence. Then, the jury would compare the seat belt negligence to the total negligence in causing the collision.

After reviewing the Foley decision, the Committee concludes that formulating the instruction and special verdict under the concurrent tort theory would be inconsistent with the Foley decision as a whole and contrary to the express recommendation of the court to this Committee. Instead, the instruction and special verdict approved by this Committee follows the court's recommendation by reducing recoverable damages by the percentage of damages attributable to the plaintiff's seat belt negligence. This formulation is consistent with the court's recognition in Foley that damages for the incremental injuries caused by the seat belt negligence should be treated separately and that those who fail to use seat belts should be held responsible for the incremental harm.

Limitation on the reduction of damages. In 1987, the Wisconsin Legislature enacted legislation requiring motor vehicle operators and passengers to wear safety belts. 1987 Wisconsin Act 132. The legislation restricts the reduction of plaintiff's damages for failure to wear a safety belt. Specifically, under Wis. Stat. § 347.48(2m)(g) created by 1987 Wisconsin Act 132, a failure to wear a safety belt shall not reduce the plaintiff's recovery of damages caused by the failure to wear a safety belt by more than 15%. The statute expressly states that this limitation does not affect the determination of causal negligence in the action.

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1278 SAFETY HELMET: FAILURE TO USE

No instruction.

COMMENT

This commentary was prepared in 2004 and updated in 2009.

See Stehlik v. Rhoads, 2002 WI 73, 253 Wis.2d 477, 645 N.W.2d 889; Hardy v. Hoefferle, 2007 WI App 264, 306 Wis.2d 513, 743 N.W.2d 843; Wis. Stat. § 895.049.

There is no instruction covering the failure to wear a safety helmet. In 2002, the Wisconsin Supreme court decided Stehlik v. Rhoads, supra, in which the court considered the availability and effect of the "helmet defense."

The plaintiff in Stehlik was injured while riding an all-terrain vehicle. The jury concluded that both the plaintiff and the ATV's owners were negligent and apportioned the accident negligence (30% plaintiff/70% defendant) and the "helmet negligence" (40% plaintiff / 60% defendant). The jury also concluded that 90% of the plaintiff's injuries were attributable to his failure to wear a helmet. The trial court's special verdict followed the formula for seat belt negligence established in Foley v. City of West Allis, 113 Wis.2d 475, 335 N.W.2d 824 (1983).

On motions after verdict, the trial judge struck the special verdict questions regarding the defendant's negligence for Stehlik's failure to wear a safety helmet, and limited Stehlik's recovery to the damages attributable to the Rhoads' negligence in causing the accident. That is, the circuit court reduced Stehlik's recovery by his 30 percent accident-causing contributory negligence, and by a further 90 percent–the percentage of his injuries the jury allocated to the failure to wear a helmet.

Applying Foley to Safety Helmet Cases. The supreme court in Stehlik concluded that a plaintiff's negligent failure to wear a safety helmet is governed by the principles applicable to a plaintiff's negligent failure to wear a seat belt established in Foley v. City of West Allis, supra. Foley separated the consideration of seat belt negligence from accident negligence and adopted a "second collision" methodology, adapted from successive tort and enhanced injury theories.

Helmet Verdict Format. The supreme court in Stehlik held the jury in a helmet defense case should apportion accident negligence *separately* from helmet negligence. Only the former is subject to Wis. Stat. § 895.045, because helmet negligence, like seat belt negligence, is a limitation on damages, not a potential bar to recovery. The court distinguished safety helmet negligence from seat belt negligence and said the helmet negligence comparison question should ask the jury to compare the plaintiff's **helmet negligence as against the total combined negligence of the defendants**, rather than treating the comparison as an allocation or division of injuries or damages, as in a successive tort or enhanced injury case.

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The court of appeals in Hardy v. Hoefferle summarized the helmet verdict format established by Stehlik as follows:

> Where the "helmet defense" is raised, a jury must make two negligence determinations. The jury must first determine and allocate "accident negligence," which refers to who caused the accident itself. The contributory negligence statute, Wis. Stat. § 895.045, applies to the jury's allocation of "accident negligence" and may reduce or bar the plaintiff's recovery.
>
> The amount that remains recoverable after applying the contributory negligence statute is then subject to a second negligence allocation, which our supreme court referred to as "helmet negligence." Before engaging in the "helmet negligence" inquiry, a jury must first decide whether the plaintiff's failure to wear a helmet was a causal factor in the plaintiff's injuries. If so, the jury must allocate "helmet negligence" between the plaintiff and the defendant. The percentage of "helmet negligence" allocated to the plaintiff further reduces the amount otherwise recoverable under the "accident negligence" inquiry. However, Wis. Stat. § 895.045's provision barring recovery where a plaintiff's negligence exceeds a defendant's negligence does not apply to a jury's allocation of "helmet negligence."

In Hardy, the court of appeals held that where § 895.049 applies to prohibit a reduction of damages, it necessarily also precludes a person's failure to wear a helmet from being considered a form of negligence. Hardy v. Hoefferle, supra. ¶ 12

Legislation on Failure to Wear Protective Headgear. In 2004, the Wisconsin Legislature enacted 2003 Wisconsin Act 148 (creating Wis. Stat. § 895.049 and 901.053) to override the common law established in Stehlik. The act is effective for actions commenced on or after March 30, 2004.

The effect of the statute is to exempt certain plaintiffs from the Stehlik "helmet negligence" inquiry. The legislation provides that: "failure by a person who operates or is a passenger on a motorcycle, as defined in s. 340.01 (32), an all–terrain vehicle, as defined in s. 340.01 (2g), or a snowmobile, as defined in s. 340.01 (58a), on or off a highway, to use protective headgear shall not reduce recovery for injuries or damages by the person or the person's legal representative in any civil action."

The legislation also provides that evidence of "use or nonuse of protective headgear by a person, other than a person required to wear protective headgear under s. 23.33 (3g) or 347.485 (1), who operates or is a passenger on a motorcycle, as defined in s. 340.01 (32), an all–terrain vehicle, as defined in s. 340.01 (2g), or a snowmobile, as defined in s. 340.01 (58a), on or off a highway, is not admissible in any civil action for personal injury or property damage."

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1280 SKIDDING

Skidding of a motor vehicle may occur without fault of the driver and having begun, it may continue without fault for a considerable space and time. On the other hand, the skidding may have been precipitated by the negligence of the driver, or the driver may have controlled the vehicle negligently after the skid began.

You may consider the driver's knowledge of the road conditions; if the slippery condition appeared suddenly without warning, the driver would be excused from a charge of negligence. On the other hand, where the icy or slippery condition of a road increases the danger of travel, and the driver is, or ought to be, aware of the condition, then the driver is required to exercise a degree of care commensurate with the conditions.

You may consider the speed of the skidding vehicle prior to or at the time of skidding, or the manner in which (the driver) controlled the car prior to skidding, or after the skidding commenced, in determining whether (the driver) was negligent.

COMMENT

This instruction and comment were approved in 1977. The instruction was updated in 2008. The comment was reviewed without change in 1989. Editorial changes were made in 1992 to address gender references in the instruction.

If wrong-side driving is involved, see Wis JI-Civil 1140, Position on Highway on Meeting and Passing: Violation Excused.

This instruction is a correct statement of the law; it is not erroneous as being, in effect, an instruction on unavoidable accident. Abbott v. Truck Ins. Exch. Co., 33 Wis.2d 671, 677, 148 N.W.2d 116 (1967).

Voigt v. Voigt, 22 Wis.2d 573, 126 N.W.2d 543 (1964), requires the sudden skidding driver (or the insurer if driver is killed) to show the driver was free from negligence in invading the wrong lane.

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In regard to ordinary care on slippery streets with respect to speed prior to skid and control before and during skid, see Coenen v. Van Handel, 269 Wis. 6, 10, 68 N.W.2d 435 (1955); Van Matre v. Milwaukee Elec. Ry. & Transp. Co., 268 Wis. 399, 67 N.W.2d 831 (1955); Zeinemann v. Gasser, 251 Wis. 238, 29 N.W.2d 49 (1947).

Skidding cases are collected in Poole v. State Farm Mut. Auto. Ins. Co., 7 Wis.2d 65, 68-69, 95 N.W.2d 799 (1959).

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1285 SPEED: REASONABLE AND PRUDENT; REDUCED SPEED

A safety statute provides that no person shall drive a vehicle at a speed greater than is reasonable and prudent under existing conditions and having regard for actual and potential hazards. This statute requires that a driver in hazardous circumstances use ordinary care to regulate the vehicle's rate of speed to avoid colliding with any object, person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and using due care.

The statute also provides that a driver must drive at an appropriate reduced speed (when approaching and crossing [an intersection] [a railway grade crossing]) (when approaching and going around a curve) (when approaching a hillcrest) (when traveling upon any narrow or winding roadway) (when passing [school children] [highway construction or maintenance workers] [other pedestrians]) (when special hazards exist with regard to other traffic or by reason of weather or highway conditions).

Appropriate reduced speed means less than the otherwise lawful speed. An appropriate reduced speed is that speed at which a person of ordinary intelligence and prudence would drive under the same or similar circumstances.

[Here insert, if appropriate, Wis JI-Civil 1310 Speed: Obstructed Vision; Wis JI-Civil 1315 Speed: Obstructed Vision Nighttime; Wis JI-Civil 1320 Speed: Camouflage.]

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COMMENT

The instruction and comment were approved in 1977 and revised in 1984. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first and second paragraphs refer, respectively, to Wis. Stat. § 346.57(2) and (3). These subsections do not impose an absolute liability upon drivers to avoid accidents. They merely restate the common-law standard of prudent conduct. Millonig v. Bakken, 112 Wis.2d 445, 452, 455, 334 N.W.2d 80 (1983).

The source of the general instruction is Bailey v. Bach, 257 Wis. 604, 608, 44 N.W.2d 631 (1950). This instruction was approved in Kraft v. Charles, 268 Wis. 44, 50-51, 66 N.W.2d 618 (1954).

Note that the literal language of the statute imposes an absolute duty and, hence, the insertion of the phrase "exercise ordinary care" is necessary to conform the instruction to Culver v. Webb, 244 Wis. 478, 492-93, 12 N.W.2d 731 (1944), and Lembke v. Farmers Mut. Auto Ins. Co., 243 Wis. 531, 535, 11 N.W.2d 169 (1943).

Where a motorist struck a pedestrian who was crossing the highway, it was held not error to give paragraph 1 of this instruction and to refuse to give paragraph 2 of this instruction as it related to passing pedestrians. Greene v. Farmers Mut. Auto Ins. Co., 5 Wis.2d 551, 554-55, 93 N.W.2d 431 (1958).

Appropriate reduced speed is a relative standard. McGee v. Kuchenbaker, 32 Wis.2d 668, 671, 46 N.W.2d 387 (1966). See also Millonig v. Bakken, supra at 455.

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1290 SPEED: FIXED LIMITS

[This instruction may be used in addition to Wis JI-Civil 1285.]

A safety statute provides that no person shall drive a vehicle at a speed in excess of ___ miles per hour _____; any speed in excess of that limit would be negligent speed regardless of (other) conditions.

It is for you to determine whether (name)'s speed was over this limit and, if under, whether it was nevertheless a negligent speed under the conditions and circumstances then present and under the rules of law given to you by these instructions.

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2008.

Wis. Stat. § 346.57(4).

The blanks are provided for the insertion of the specific appropriate speed limit of the statute.

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1295 SPEED: SPECIAL RESTRICTIONS FOR CERTAIN VEHICLES

[This instruction may be used in addition to Wis JI-Civil 1285 and 1290.]

A statute further provides that in addition to complying with other speed restrictions imposed by law, no person shall drive a _____ in excess of _____ miles per hour.

It is for you to determine whether (name)'s speed was over this limit and, if under, whether it was nevertheless a negligent speed under the conditions and circumstances then present.

COMMENT

This instruction was approved by the Committee in 1960. The instruction was revised in 2008. The comment was updated in 1982 and 1989.

The statute mentioned in the instruction is Wis. Stat. § 346.58.

The blanks are provided for insertion of the specific appropriate phrase of the statute. The statute sets out only one category of motor vehicles to which a special speed restriction applies: Vehicles equipped with metal or solid rubber tires (15 m.p.h.).

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1300 SPEED: IMPEDING TRAFFIC

The statutes regulating the speed of motor vehicles, in addition to regulating maximum speeds, also provide that no person shall drive a motor vehicle at a speed so slow as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation (or is necessary to comply with the law). To comply with this statute, a driver is required to use ordinary care under circumstances then and there existing.

COMMENT

This instruction was approved by the Committee in 1960. The instruction was revised in 2008. The comment was updated in 1982.

The phrase in parentheses is to be used where special speed restrictions apply or traffic is being controlled by an officer. See Wis. Stat. § 346.59(1).

This instruction was approved in Bentzler v. Braun, 34 Wis.2d 362, 375, 149 N.W.2d 626 (1967). Where appropriate, the following sentence may be added: "The statute does not apply to a vehicle until it has been on the highway a sufficient time to attain a normal speed." Bentzler v. Braun, supra at 376.

In Werner Transp. Co. v. Barts, 57 Wis.2d 714, 723, 205 N.W.2d 394 (1973), the court stated that Wis. Stat. § 346.59 is a safety statute "which invokes the rule of negligence per se."

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1305 SPEED: FAILURE TO YIELD ROADWAY

A safety statute provides that if the driver of a motor vehicle is moving the vehicle so slowly as to impede the normal and reasonable movement of traffic, then the driver shall, if practicable, yield the roadway to an overtaking vehicle and shall move at a reasonably increased speed or yield the roadway to overtaking vehicles when directed to do so by a traffic officer.

COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 1992, 2008, and 2015.

Wis. Stat. § 346.59(2) requires a slow moving vehicle to yield the right of way if practicable. In 2014, the requirement that the overtaking vehicle give "audible warning" was eliminated. 2013 Wis. Act 365.

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1310 SPEED: OBSTRUCTED VISION

A driver of a motor vehicle on a highway has a duty to drive at a rate of speed that will permit the driver to stop within the distance the driver can see ahead. [This means that if, by reason of (a grade) (fog) (rain) (snow) (dust) (smoke) (or otherwise), the distance that the driver can plainly see objects or obstructions ahead of is reduced, then the driver must drive at a rate of speed that will enable the driver to bring the car to a standstill within the reduced distance.] [When a driver's vision is completely obscured, it is the driver's duty to slow down, or even stop, until the cause of the obscured vision is at least in part removed.]

COMMENT

This instruction was initially approved in 1960. The instruction and comment were revised by the Committee in 1982. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

This instruction is based on Guderyon v. Wisconsin Tel. Co., 240 Wis. 215, 227, 2 N.W.2d 242, 247 (1942), and Lauson v. Fond du Lac, 141 Wis. 57, 60-61, 123 N.W. 629, 630-31 (1909). See also Barker Barrel Co. v. Fisher, 10 Wis.2d 197, 200, 102 N.W.2d 107 (1960); Bailey v. Hagen, 25 Wis.2d 386, 130 N.W.2d 773 (1964); Kinsman v. Panek, 40 Wis.2d 408, 162 N.W.2d 27 (1968). The Guderyon case involved a motorist who, in the daytime, blinded by a cloud of smoke, collided with a parked truck.

See also Wis. Stat. § 346.57(2) and (3).

It is recommended that the last sentence of this instruction be read with the other portions of the paragraph when the facts warrant. In prior versions of this instruction, the last sentence was enclosed in brackets to indicate that its inclusion in the instruction was optional. In Nelson v. Travelers Ins. Co., 80 Wis.2d 272, 284, 259 N.W.2d 48 (1977), the trial court omitted the last sentence. On appeal, the court stated:

> While it might not have been prejudicial to omit the last sentence of the pattern instruction because it is only a logical extension of what precedes it, we believe the instruction should have been given in its entirety. It is an accurate statement of the law and could have had application to one version of the facts.

Where the obstruction is in or on the vehicle itself, see Wis. Stat. § 346.88.

Wis JI-Civil 1315 and 1320, which follow, deal, respectively, with obstructed vision in the nighttime and with camouflage.

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1315 SPEED: OBSTRUCTED VISION: NIGHTTIME

A driver of a motor vehicle on a highway in the nighttime has a duty to drive at a rate of speed that will permit the driver to stop within [the range of the vehicle's headlights under the weather conditions then prevailing] [the distance the driver can see ahead]. [This means that if by reason of (a grade) (rain) (fog) (snow) (dust) (dazzling lights of an oncoming car) (or otherwise), the distance that the driver can plainly see objects or obstructions ahead is reduced, the driver must drive at a rate of speed that will enable the driver to bring the car to a standstill within the reduced distance.] [When a driver's vision is completely obscured, it is the driver's duty to slow down, or even stop, until the cause of the obscured vision is at least in part removed.]

COMMENT

This instruction was approved by the Committee in 1960. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

This instruction is based on Schroeder v. Kuntz, 263 Wis. 590, 593, 58 N.W.2d 445, 447 (1953), and Quady v. Sickl, 260 Wis. 348, 353, 51 N.W.2d 3, 5 (1952), in each of which a driver ran into a parked car, blinded by the lights of an oncoming car; Reuhl v. Uszler, 255 Wis. 516, 522, 39 N.W.2d 444, 448 (1949), in which a hillcrest obstructed a driver's view; Kleist v. Cohodas, 195 Wis. 637, 640-41, 219 N.W. 366, 367 (1928), in which it was snowing; Lauson v. Fond du Lac, 141 Wis. 57, 60-61, 123 N.W. 629, 630-31 (1909), in which a driver ran into a barrier on a dark, rainy night.

A car operator is not necessarily negligent in proceeding ahead over pavement he or she had observed by preview is clear of obstructions, even though thereafter blinded by approaching lights of an oncoming car. Cary v. Klabunde, 12 Wis.2d 267, 107 N.W.2d 142 (1961).

The last sentence is based on the Schroeder case, supra, and cited cases. See Comment to Wis JI-Civil 1310 as to inclusion of the last sentence.

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1320 SPEED: CAMOUFLAGE

This rule, however, does not apply to situations where the object or obstruction ahead, although within the range of the driver's (headlights) (vision), may not reasonably be discovered because it blends with the color of the roadway or surroundings. When I refer to an object or obstruction that may not reasonably be discovered, I mean an object or obstruction that may not be seen by a driver exercising ordinary care with respect to lookout in time to enable the driver to stop before reaching it.

COMMENT

This instruction was approved by the Committee in 1960. The comment was updated in 1982 and was reviewed without change in 1989. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

The camouflage instruction is found in Zoellner v. Kaiser, 237 Wis. 299, 303, 296 N.W. 611, 613 (1941); Butts v. Ward, 227 Wis. 387, 393, 279 N.W. 6, 8-9 (1938); and Mann v. Reliable Transit Co., 217 Wis. 465, 470, 259 N.W. 415, 416-17 (1935). See also Schroeder v. Kuntz, 263 Wis. 590, 593-94, 58 N.W.2d 445, 447 (1953).

Expressions in some of the cases indicate that the camouflage doctrine may bear upon negligence with respect to lookout rather than speed. It is clear, however, that the camouflage doctrine bears upon the question of speed and is in modification of the doctrine of Lauson v. Fond du Lac, 141 Wis. 57, 60-61, 123 N.W. 629, 631 (1909). Although these cases cover only the blending of objects with roads, it is considered that the principle also applies to the blending of objects with other surroundings.

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1325 STOP AT STOP SIGNS

A safety statute provides that the driver of a vehicle approaching an official stop sign at an intersection shall cause the vehicle to stop before entering the intersection.

The stop required shall be made in the following manner:

[Select the proper item or items below to complete the instruction.]

(a) If there is a clearly marked stop line, the driver shall stop the vehicle immediately before crossing this line.

(b) If there is no clearly marked stop line, the driver shall stop the vehicle immediately before entering the nearest crosswalk.

(c) If there is neither a clearly marked stop line nor a marked or unmarked crosswalk at the intersection, the driver shall stop the vehicle before entering the intersection at a point from which the driver can efficiently observe traffic on the intersecting roadway.

[Note: If you use (a) or (b) above, then use paragraph (d).]

(d) If the driver cannot efficiently observe traffic on the intersecting roadway from the stop made at the stop line or crosswalk, the driver shall, before entering the intersection, again stop the vehicle at a point as will enable the driver to efficiently observe the traffic on the intersecting roadway.

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 1992 and 2008.

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Safety Statute. Wis. Stat. § 346.46. This statute is a safety statute. Totsky v. Riteway Bus Service, Inc., 233 Wis.2d 371, 607 N.W.2d 637 (2000). The violation of Wis. Stat. 346.46(1) is negligence per se, but violation can be excused through application of the emergency doctrine. Totsky, supra; Wis JI-Civil 1105A.

Definitions. Statutory definitions of "intersection," "roadway," "highway," "crosswalk," "stop," and "through highway," if needed, are set forth in Wis. Stat. § 340.01.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

If an issue arises as to an "official" stop sign, see Wis. Stat. §§ 349.07 and 349.08 for authority to designate through highways and for the type of sign.

Lookout and Right of Way. For related duties as to lookout and right of way, see Bowers v. Treuthardt, 5 Wis.2d 271, 275, 92 N.W.2d 878, 881 (1958); Lewis v. Leiterman, 4 Wis.2d 592, 598-99, 91 N.W.2d 89, 92-93 (1958); Plog v. Zolper, 1 Wis.2d 517, 527-28, 85 N.W.2d 492, 498 (1957); Wis JI-Civil 1065, Lookout: Entering or Crossing Through Highway.

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1325A STOP AT STOP SIGNS [ALTERNATE]

A safety statute provides that the driver of a vehicle must come to a full and complete stop before entering an intersection at which has been erected an official stop sign designating an artery for through traffic. (Highway) (Street), on which (name) was traveling at the time and place in question, was an arterial highway, and there was erected at the proper place on _____ an arterial stop sign, requiring drivers on that _____ to stop. The statute further provides that:

[Select one or more of the following items to complete this paragraph.]

(a) If there is a clearly marked stop line, as there was at the stop line here, the driver must stop before crossing such line.

(b) If there is no clearly marked stop line, which was the situation here, the driver shall, if there is a crosswalk, as there was here, stop before entering the crosswalk.

(c) If there is neither a crosswalk nor a stop line at the intersection, which was the situation here, the driver, before entering the intersection, shall stop the vehicle at a point from which the driver can efficiently observe traffic on the intersecting roadway.

[I have previously defined for you the meaning of the word intersection.]

["Intersection" means the area embraced within the prolongation of the lateral boundary lines of two or more highways which join one another at an angle, whether or not one highway crosses the other.]

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A "highway" is defined by statute as being every way or place, of whatever nature, open to the use of the public as a matter of right for the purposes of vehicular travel.

It is not sufficient that a driver before entering an arterial highway at which there is a (crosswalk) (marked stop line) stop at the (crosswalk) (marked stop line) only. If the driver cannot efficiently observe traffic on the arterial highway from that point, the driver must stop again, before entering the highway, at a point where the driver can efficiently observe traffic approaching on the arterial highway.

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 1992 and 2008.

Wis. Stat. § 346.46. This statute is a safety statute. Totsky v. Riteway Bus Service, Inc., 233 Wis.2d 371, 607 N.W.2d 637 (2000).

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1330 STOP: EMERGING FROM AN ALLEY

A safety statute requires that the driver of a vehicle:

[Select the proper item below to complete the paragraph.]

(a) emerging from an alley shall stop the vehicle immediately prior to moving onto the sidewalk or onto the sidewalk area extending across the path of the vehicle.

(b) proceeding on an alley shall stop the vehicle immediately before crossing or entering an intersecting alley, whether or not the intersecting alley crosses the alley on which the vehicle is being driven.

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 2008.

Wis. Stat. § 346.47. Subsection (1) of the statute also requires the operator emerging from an alley to yield the right of way to both pedestrians and vehicles. See the cases cited in comment to Wis JI-Civil 1325, Stop at Stop Signs. See the statutory definition of "alley" in Wis. Stat. § 340.01(2).

The statute seems no longer to require a stop before entering a highway from a point of access other than another highway unless a sidewalk or sidewalk area is involved. See Wis. Stat. § 346.47.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

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1335 EMERGING FROM A PRIVATE DRIVEWAY OR OTHER NONHIGHWAY ACCESS

A safety statute requires that the driver of a vehicle (emerging from an alley) about to cross or enter a highway from any point of access other than another highway shall stop the vehicle immediately prior to moving on to the sidewalk or on to the sidewalk area extending across the path of the vehicle and shall yield the right of way to any pedestrian and upon crossing or entering the roadway shall yield the right of way to all vehicles approaching on the roadway.

(Unless a traffic control officer or official traffic control device otherwise directs or permits, the driver of a vehicle about to cross or enter a highway from a point of access other than another highway is required to stop.)

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 2008.

Wis. Stat. § 346.47.

(The statute also provides that the driver of a vehicle on an alley shall stop the vehicle immediately before crossing or entering an intersecting alley, whether or not the intersecting alley crosses the alley on which the vehicle is being driven. Wis. Stat. § 346.47(2).)

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

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1336 RAILROAD CROSSING: DRIVER'S DUTY

A driver upon a highway, who is approaching a railroad grade crossing, has a duty to use ordinary care for his or her own safety. To perform this duty, a driver must not only look in both directions to determine whether a train is approaching but must listen as well. If by reason of any obstruction to his or her view as the driver approaches the tracks the driver is unable to make an efficient observation, the driver must slow down or stop the vehicle, if necessary, before entering upon the crossing to use his or her senses of hearing and vision effectively.

(If a driver claims to have looked and yet failed to see an approaching train which you determine must have been in plain sight or hearing, then the driver must either be deemed to have failed to look or to have looked and yet heedlessly submitted himself or herself to the danger.)

[Note: Add Wis JI-Civil 1338, Nonoperation of Railroad Crossing Signals, if appropriate.]

COMMENT

The instruction and comment were originally published in their present form in 1967. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first paragraph is supported by Bembister v. Aero Auto Parts, 12 Wis.2d 252, 107 N.W.2d 134 (1961); Keegan v. Chicago, M., St. P. & P. R.R., 251 Wis. 7, 27 N.W.2d 739 (1947); Bellrichard v. Chicago & N. W. Ry., 247 Wis. 569, 20 N.W.2d 710 (1945).

The second paragraph is supported by Odgers v. Minneapolis, St. P. & S. S. M. Ry., 261 Wis. 363, 52 N.W.2d 917 (1952), which quotes White v. Minneapolis, St. P. & S. S. M. Ry., 147 Wis. 141, 133 N.W. 148 (1911).

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Wis JI-Civil 1070, Lookout: Failure To See Object In Plain Sight, may be substituted for paragraph two.

The duty to look and listen before entering upon a railroad track is absolute. Bellrichard v. Chicago & N. W. Ry., supra, and a complete failure to look or listen or to see what had to be in sight would probably be negligence as a matter of law. Keegan v. Chicago, M., St. P. & P. R.R., supra.

However, the presence of safety measures or devices at the crossing may make the conduct of the plaintiff (as an exercise of ordinary care under the circumstances) a jury issue. See Wis JI-Civil 1338, Nonoperation Of Railroad Crossing Signals, and Comment.

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1337 STOP: ALL VEHICLES AT RAILROAD CROSSING SIGNALS

A safety statute requires that the driver of a vehicle shall not drive on or across a railroad crossing:

[Select the appropriate following paragraph.]

(a) While any traffic officer or railroad employee signals to stop;

(b) While any warning device signals to stop, except that, if the driver of the vehicle, after stopping and investigating, finds that no railroad train or railroad track equipment is approaching, the driver may proceed.

(c) If any crossbuck sign is maintained at the crossing, while a railroad train or railroad track equipment occupies the crossing or approaches so closely to the closing as to be a hazard of collision.

[The statute further provides that a driver of a vehicle shall not drive through, around, or under any crossing gate or barrier at a railroad crossing while the gate or barrier is closed or is being opened or closed.]

COMMENT

The instruction and comment were originally published in 1962. The instruction was revised in 1992, 2008, and 2015.

The last paragraph is to be used only in appropriate instances.

Wis. Stat. § 346.44.

In connection with paragraph (b), which permits a driver to proceed if, after investigation, a driver finds no train coming, it is suggested that under some fact situations additional questions on violations of duty to look and listen may be necessary. If an additional question is used, it will be desirable to expand this paragraph for use as an instruction with such question. If there is conflict in the evidence as to looking and listening, and no additional question is used, the instruction should be expanded to cover duty in these respects. See, for example, the last paragraph of Wis JI-Civil 1339.

Plog v. Zolper, 1 Wis.2d 517, 527, 85 N.W.2d 492, 498 (1957); Ligman v. Bitker, 270 Wis. 556, 72 N.W.2d 340 (1955).

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1337.5 STOP: PEDESTRIAN CROSSING RAILROAD TRACKS

A safety statute requires that a pedestrian may not enter or cross a railroad crossing: [Select the appropriate following paragraph.]

(a) While any traffic officer or railroad employee signals to stop;

(b) While any warning device signals to stop, except that, if the pedestrian, after stopping and investigating, finds that no railroad train or railroad track equipment is approaching, the pedestrian may proceed.

(c) If any crossbuck sign is maintained at the crossing, while a railroad train or railroad track equipment occupies the crossing or approaches so closely to the closing as to be a hazard of collision.

[The statute also provides that a pedestrian may not cross through, around, or under any crossing gate or barrier at a railroad crossing, while the gate or barrier is closed or is being opened or closed.] [The statute also provides that a pedestrian may not cross through or around or climb over or under a railroad train or railroad track equipment while the railroad train or railroad track equipment occupies a railroad crossing.]

COMMENT

The instruction and comment were approved in 2015.

Wis. Stat. § 346.445 (2013 Wis. Act 219).

The last two sentences are to be used only in appropriate instances.

See also Wis JI-Civil 1337, Commentary.

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1338 STOP: NONOPERATION OF RAILROAD CROSSING SIGNALS

A driver who intends to cross a railroad track may not rely on the nonoperation of a safety device (absence of the usual flagman) as an absolute assurance of safety and may not proceed without regard to his or her own safety; the driver must still exercise ordinary care for his or her own protection. However, the presence or absence of warning guards and the proper functioning or nonfunctioning of guards or signals are circumstances to be considered in determining whether the driver used ordinary care.

COMMENT

The instruction and comment were originally published in their present form in 1962. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

This instruction is to be used, in the proper instances, as a supplement to an instruction on lookout, listening, speed, or management and control, as may be appropriate.

Wasikowski v. Chicago & N. W. Ry., 259 Wis. 522, 525, 49 N.W.2d 481, 482 (1951); Gundlach v. Chicago & N. W. Ry., 172 Wis. 438, 441, 179 N.W. 577, 578, 885 (1920).

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1339 STOP: SPECIAL VEHICLES AT RAILROAD CROSSING

A safety statute requires that the driver of a vehicle (describe from Wis. Stat. § 346.45(1)) before crossing at grade any track of a railroad shall stop the vehicle within 50 feet but not less than 15 feet from the nearest rail of the railroad.

The driver of a vehicle required to stop before crossing any track shall listen and look in both directions along the track for any approaching train, and shall not proceed until such precautions have been taken and until the operator has ascertained that the course is clear. Whenever an auxiliary lane is provided for stopping at a railroad, driver of vehicles required to stop shall use the lane for stopping.

A stop need not be made at:

(a) a railroad grade crossing when a police officer or crossing flagman directs traffic to proceed.

(b) a railroad grade crossing when an official traffic control signal permits traffic to proceed.

(c) an abandoned railroad grade crossing with a sign indicating the rail line is abandoned.

COMMENT

The instruction and comment were approved by the Committee in 1980. The comment was updated in 1989. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Wis. Stat. § 346.45.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

A stop also need not be made at a railroad grade crossing which is marked with a sign in accordance with Wis. Stat. § 195.285(3). Such signs shall be erected by the maintaining authority only upon order of the Commissioner of Railroads as set forth in § 195.285.

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1340 STOP: FOR SCHOOL BUS LOADING OR UNLOADING CHILDREN

The driver of a vehicle which approaches from the front or rear any school bus which has stopped on a street or highway and when the bus is displaying flashing red warning lights shall stop the vehicle not less than 20 feet from the bus and shall remain stopped until the bus resumes motion or the bus driver extinguishes the flashing red warning lights.

COMMENT

The instruction and comment were approved by the Committee in 1980. The instruction was revised in 2008. The comment was updated in 1989 and 2008.

See Wis. Stat. § 346.48(1) and (2) for the duty of the school bus driver to:

(1) stop and display lights when approaching another school bus,
(2) actuate lights at least 100 feet before stopping to load or unload,
(3) not to use red flashing lights.

See Wis. Stat. § 346.48(1) for the obligation of an operator of a vehicle proceeding in the opposite direction on a divided highway.

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1350 TURN OR MOVEMENT: SIGNAL REQUIRED

A safety statute provides that, if traffic may be affected by (the turning of a vehicle at an intersection) (the turning of a vehicle at a private road or driveway) (the turning of a vehicle from a direct course or by movement of the vehicle right or left upon the roadway), a person so (turning) (moving) shall give an appropriate signal by hand or directional signal of the intention to turn or move.

The statute also provides that the signal shall be given continuously not less than the last 100 feet traveled by the vehicle before turning.

COMMENT

This instruction and comment were approved by the Committee in 1980. The comment was revised in 1986. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Wis. Stat. § 346.34(1) is a safety statute, the violation of which is negligence per se. Betchkal v. Willis, 127 Wis.2d 177, 183, 378 N.W.2d 684 (1985). Thus, making a turn in violation of Wis. Stat. § 346.34(1) is negligence as a matter of law. Grana v. Summerford, 12 Wis.2d 517, 521, 107 N.W.2d 463 (1961).

See also Wis JI-Civil 1352, Turn: Position and Method, and Wis JI-Civil 1354, Turn or Movement: Ascertainment that Turn or Movement Can Be Made with Reasonable Safety: Lookout.

Note that the sentence of § 346.34(1)(b), which creates the 100 feet signal requirement, does not specifically apply to deviation. Also, the operator of a bicycle must signal "continuously not less than the last 50 feet traveled before turning." Wis. Stat. § 346.34(1)(b).

When a vehicle is stopped for the purpose of turning, negligence from failure to signal turn may be found causal to rear end collision. Delong v. Sagstetter, 16 Wis.2d 390, 114 N.W.2d 788 (1962); Bannach v. State Farm Mut. Auto Ins. Co., 4 Wis.2d 194, 197, 90 N.W.2d 121 (1958); American Fidelity & Casualty Co. v. Travelers Indem. Co., 3 Wis.2d 209, 214, 87 N.W.2d 782 (1958). But see Greenville Coop. Gas Co. v. Lodesky, 259 Wis. 376, 48 N.W.2d 234 (1951).

Drivers not on the highway, but about to enter it, are not "traffic which may be affected" by the change in lanes. Donlea v. Carpenter, 21 Wis.2d 390, 124 N.W.2d 305 (1963).

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In Tuschel v. Haasch, 46 Wis.2d 130, 139-40, 174 N.W.2d 497 (1970), and later in Betchkal, supra, the court held that where conditions do not allow for a full 100 feet for signaling a turn, a driver is not automatically negligent in giving the signal for a lesser distance.

In Betchkal, the court said it was clear from the statutory language of Wis. Stat. § 346.34 that the legislature intended the statute to apply only to situations where at least 100 feet has been traveled by the turning vehicle. See also Tuschel v. Haasch, supra. In Betchkal and Tuschel, the court rejected its earlier holding in Sparling v. Thomas, 264 Wis. 506, 59 N.W.2d 433 (1953), which applied the signaling statute to situations where the turning vehicle had traveled less than 100 feet before turning by requiring a turning vehicle to yield the right of way to a following vehicle.

Forfeiture of Right of Way. The court said in Betchkal that it is error to interpret Wis. Stat. § 346.34(1)(b) as creating a right of way for the following driver when the turning driver has traveled less than 100 feet before turning. The court said that, in Wisconsin, a forfeiture of right of way does not shift or transfer the right of way to the other driver as suggested in Sparling. Thus, the court held that the trial court erred by instructing the jury, according to Sparling, that "if a vehicle cannot signal its intention to turn continuously for a distance of not less than 100 feet before turning, it is required to yield the right of way to a vehicle approaching from the rear." This instruction was error. Instead of right of way being transferred to the competing driver, the driver with the right of way loses it, and neither party has a statutory right of way.

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1352 TURN: POSITION AND METHOD WHEN NOT OTHERWISE MARKED OR POSTED

A safety statute prescribes the required position of a vehicle when making a (right turn) (left turn into an intersection) (left turn into a private road or driveway) (turn indicated by markers).

[Use the appropriate following paragraph.]

[Right Turn: The law requires that both the approach for a right turn and the right turn shall be made as closely as practicable to the right-hand edge or curb of the roadway. If, because of the size of the vehicle or the nature of the intersecting roadway, the turn cannot be made from the traffic lane next to the right-hand edge of the roadway, the turn shall be made with due regard for all other traffic.]

[Left Turn: The law requires that the approach for a left turn shall be made in that lane farthest to the left which is lawfully available to traffic moving in the direction of travel of the vehicle about to turn left. This means (the lane immediately to the right of the center line or center dividing strip of the two-way highway) (the lane next to the left-hand curb or edge of the roadway of the one-way highway). The intersection shall be entered in the lane of approach and, whenever practicable, the left turn shall be made in that portion of the intersection immediately to the left of the center of the intersection. The left turn shall be completed so as to enter the intersecting highway in the lane farthest to the left which is lawfully available to traffic moving in the direction of the vehicle completing the left turn. This means (the lane immediately to the right of the center line or center dividing strip of the

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two-way highway) (the lane next to the left-hand curb or edge of the roadway of the one-way highway).]

[Left Turn into Private Road or Driveway: The law requires that the approach for a left turn into a private road or driveway shall be made in the lane farthest to the left which is lawfully available to traffic moving in the direction of travel of the vehicle about to turn left. This means (the lane immediately to the right of the center line or center dividing strip of the two-way highway) (the lane next to the left-hand curb or edge of the roadway of the one-way highway) (the center lane of the three-lane highway). If, because of the size of the vehicle or the nature of the intersecting private road or driveway, the turn cannot be made from the specified lane of approach, the turn shall be made with due regard for all other traffic.]

COMMENT

The instruction and comment were originally published in their present form in 1966. The instruction was revised in 2008.

Wis. Stat. §§ 346.31, 346.32. For left turns on 3-lane highways, see Wis. Stat. § 346.31.

See also Wis JI-Civil 1350, Turn or Movement: Signal Required, and Wis JI-Civil 1354, Turn or Movement: Ascertainment that Movement can be Made with Reasonable Safety: Lookout.

This instruction is not to be given when the highway is otherwise marked or posted.

Niedbalski v. Cuchna, 13 Wis.2d 308, 108 N.W.2d 576 (1961); Schwartz v. San Felippo, 11 Wis.2d 32, 103 N.W.2d 916 (1960); Wintersberger v. Pioneer Iron & Metal Co., 6 Wis.2d 69, 94 N.W.2d 136 (1959); Pedek v. Wegemann, 274 Wis. 47, 81 N.W.2d 49 (1957).

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1354 TURN OR MOVEMENT: ASCERTAINMENT THAT TURN OR MOVEMENT CAN BE MADE WITH REASONABLE SAFETY: LOOKOUT

A safety statute provides that no person shall (turn his or her vehicle at an intersection) (turn into a private road or driveway) (turn from a direct course or move right or left upon a roadway) unless and until the movement can be made with reasonable safety.

This statute requires the driver of the turning vehicle to use ordinary care to make an efficient lookout. This calls for the driver to use ordinary care to determine the presence, location, distance, and speed of any vehicle that might be affected by the driver's turn or movement. After having made these observations, the driver must also use reasonable judgment in calculating the time required to safely turn or move without interfering with other vehicles within or approaching the vehicle's course of travel.

COMMENT

The instruction and comment were originally published in 1966 and revised in 1980, 1992, and 2009.

Wis. Stat. § 346.34(1).

See also Wis JI-Civil 1350, Turn or Movement: Signal Required, and Wis JI-Civil 1352, Turn: Position and Method.

A jury question based on § 346.34(1) and another question based on lookout would result in duplicity. "When an inquiry is made in the form of the verdict of a statutory duty [ascertaining that turn can be made with reasonable safety] which includes several elements of conduct, one of those elements should not also be made the subject of a separate inquiry." Grana v. Summerford, 12 Wis.2d 517, 107 N.W.2d 463 (1961).

"There is no duty to keep a lookout ahead independently of making the observation required under § 85.175(1) [now § 346.34(1)]. It is one and the same duty." Grana, supra at 524. However, questions on lookout and on position on the highway when turning would not be duplicitous.

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If the evidence shows that the left-turning motorist failed to see approaching traffic, there was a failure as to lookout, and there is no need to instruct on calculation. Zartner v. Scopp, 28 Wis.2d 205, 214, 137 N.W.2d 107 (1965).

Cases involving vehicles approaching from rear are Schweidler v. Caruso, 269 Wis. 438, 69 N.W.2d 611 (1955); J.W. Cartage Co. v. Laufenberg, 251 Wis. 301, 28 N.W.2d 925 (1947).

Cases involving vehicles approaching from opposite directions are Schwarz v. Winter, 272 Wis. 303, 74 N.W.2d 447 (1956); Mezera v. Pahmeier, 258 Wis. 229, 45 N.W.2d 620 (1951).

Cases involving reasonable judgment are Plog v. Zolper, 1 Wis.2d 517, 85 N.W.2d 492 (1957); DeBaker v. Austin, 233 Wis. 39, 287 N.W.2d 720 (1939).

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1355 DEVIATION FROM TRAFFIC LANE: CLEARLY INDICATED LANES

A safety statute provides that the driver of a vehicle shall drive as nearly as practicable entirely within a single lane and not deviate from the lane in which the driver is driving without first determining that the movement can be made with safety to other vehicles approaching from the rear.

A driver of the vehicle who is changing his or her lane of travel is required to use ordinary care to make an efficient lookout. This means the driver must use ordinary care to determine the presence, location, distance, and speed of any vehicle that might be affected by the change of lanes. After having made these observations, the driver must also use reasonable judgment in calculating the time required to safely deviate from a traffic lane without interfering with other vehicles.

COMMENT

The instruction and comment were originally published in 1966 and revised in 1980 and 1984. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Wis. Stat. §§ 346.13(1), 346.34(1). See also Westfall v. Kottke, 110 Wis.2d 86, 108, 328 N.W.2d 481 (1983).

See also Wis JI-Civil 1350, Turn or Movement: Signal Required, and Wis JI-Civil 1114, Duty of Preceding Driver to Following: Lookout.

This instruction is to be given only when there are clearly indicated lanes. If lanes are not clearly indicated, the proper instruction is Wis JI-Civil 1354. Committee Notes, 1957, 40 W.S.A. at 331.

The provisions of this statute apply to the entire roadway. Schweidler v. Caruso, 269 Wis. 438, 447, 69 N.W.2d 611, 616 (1955); Green Bay-Wausau Lines, Inc. v. Mangel, 257 Wis. 92, 95-96, 42 N.W.2d 493, 495 (1950); J.W. Cartage Co. v. Laufenberg, 251 Wis. 301, 304, 28 N.W.2d 925, 926 (1947).

An additional verdict question on lookout would be duplication. Grana v. Summerford, 12 Wis.2d 517, 523, 107 N.W.2d 463 (1961).

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1380 NEGLIGENCE: TEACHER: DUTY TO INSTRUCT OR WARN

Question __ asks whether the defendant, _____, was negligent with respect to instructing or warning the plaintiff, _____, of the dangers present in (conducting the experiment, using the trampoline, etc.).

A teacher occupies a position in relation to his or her pupils comparable to that of a parent to his or her children. A teacher has the duty to instruct and to warn the pupils in his or her custody of any dangers which the teacher knows, or in the exercise of ordinary care ought to know, are present in the classroom (laboratory, gymnasium, etc.) and to instruct them in methods which will protect them from those dangers, whether the danger arises from equipment, devices, machines, or chemicals. A failure to warn the students of such danger or instruct them in means of avoiding such danger is negligence.

COMMENT

The instruction was originally published in its present form in 1967. The comment was updated in 2010 and 2020. The 2020 revision updated case law citations.

Grosso v. Wittemann, 266 Wis. 17, 62 N.W.2d 386 (1954); 32 A.L.R.2d 1163-1186 (1953); Restatement, Second, Torts § 320 (1965); Heuser v. Community Insurance Corp., 2009 WI App 151, 321 Wis.2d 729, 774 N.W.2d 653.

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1381 NEGLIGENCE: TEACHER: DUTY TO SUPERVISE STUDENTS

Question _ asks whether the defendant, ____, was negligent in the supervision which he or she maintained over the plaintiff, ____, in his or her (conducting the experiment, using the trampoline, etc.).

As to his or her pupils, a teacher occupies a position comparable to that of a parent in regard to protecting his or her children from harm or injury. This relationship requires the teacher to maintain that degree of supervision which an ordinarily prudent (chemistry teacher, physical education teacher, manual arts teacher) would maintain under the same or similar circumstances.

In determining whether defendant, _____, exercised ordinary care, you may weigh and consider the age, intelligence, and experience which (defendant) knew, or ought to have known, that (plaintiff) and other students in the class possessed.

You may further weigh and consider the responsibilities which had been placed upon (defendant) by (his) (her) employment, such as the curriculum (he) (she) was required to carry out, the daily schedule which was imposed on (him) (her), the number of pupils assigned to (him) (her) in the class, the size and arrangement of the classroom, and the equipment, devices, and other objects therein.

COMMENT

The instruction and comment were originally published in 1967. The comment was updated in 1980 and 2016. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

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Grosso v. Wittemann, 266 Wis. 17, 62 N.W.2d 386 (1954); 32 A.L.R.2d 1163-1186 (1953); Restatement, Second, Torts § 320 (1965).

A teacher in a school has a common-law duty to use reasonable care in the supervision of those pupils in his or her charge. Larry v. Commercial Union Ins. Co., 88 Wis.2d 728, 738, 277 N.W.2d 821 (1979); Cirillo v. Milwaukee, 34 Wis.2d 705, 150 N.W.2d 460 (1967); Meihost v. Meihost, 29 Wis.2d 537, 545, 139 N.W.2d 116 (1966).

Where the teacher leaves a classroom, relevant considerations for examining the teacher's duty to use "reasonable care" include:

> . . . the activity in which the students are engaged, the instrumentalities with which they are working (band saws, dangerous chemicals), the age and composition of the class, the teacher's past experience with the class and its propensities, and the reason for and duration of the teacher's absence. Cirillo v. Milwaukee, supra at 715.

Negligence; Standard of Care. See the comment to Wis JI-Civil 1005.

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1383 EMPLOYER NEGLIGENCE: NEGLIGENT HIRING, TRAINING, OR SUPERVISION

In this case, (plaintiff) claims (defendant)'s employee, (employee's name), engaged in conduct that injured (him) (her). (Plaintiff) further claims that (defendant) was negligent in the (hiring) (training) (supervision) of (defendant's employee).

Question 1 asks you to determine whether the (defendant's employee) [was negligent (describe the alleged act or failure to act)] [describe the alleged intentional tort, e.g., committed a battery] [describe the alleged wrongful act that violates public policy]. [Insert here an appropriate instruction covering the wrongful act, whether it be a (1) negligent tort, (2) an intentional tort, or (3) a violation of public policy as evidenced by existing statutory law.]

Question 2 asks whether the (conduct) (negligence) of (defendant's employee) was a cause of the (accident) (injury to the (plaintiff)). If you are required to answer this question, you must consider whether there was a causal connection between the (conduct) (negligence) of (defendant's employee) and the (accident) (injury to the (plaintiff)). [The question does not inquire about "the cause" but rather "a cause." The reason for this is that there may be more than one cause of an (accident) (injury). The negligence of one person may cause an (accident) (injury to the (plaintiff)) or the combined negligence of two or more persons may cause it.] Before you find that the (accident) (injury) was caused by (defendant's employee)'s (conduct) (negligence), you must find that this (conduct) (negligence) was a substantial factor in producing the (accident) (injury to (plaintiff)).

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Question 3 asks whether (defendant) was negligent in (hiring) (training) (supervising) (employee). An employer is required to use ordinary care in (hiring) (training) (supervising) its employees. Ordinary care is the care which a reasonable person would use in similar circumstances. An employer is not using ordinary care and is negligent, if the employer, without intending to do harm, does something (or fails to do something) with respect to the (hiring) (training) (supervision) of an employee that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property from the employees conduct .

Question 4 asks whether the negligence of (defendant) was a cause of the (conduct) (negligence) of (defendant's employee). If you are required to answer this question, you must consider whether there was a causal connection between (defendant)'s negligence and the (conduct) (negligence) of (employee) which in turn was a cause of the (accident) (injury to (plaintiff)). [The question does not inquire about "the cause" but rather "a cause." The reason for this is that there may be more than one cause of the employee's (negligence) (conduct). The negligence of one person may cause the employee's (negligence) (conduct) or the combined negligence of two or more persons may cause it.] Before you find that (defendant)'s negligence was a cause of (employee)'s (conduct) (negligence), you must find that the negligence was a substantial factor in producing the (accident) (injury to (plaintiff)).

SPECIAL VERDICT

1. [**Committee Note to Trial Judge**: This question requires the jury to determine whether the alleged wrongful act was committed by the employer's employee. The question will be adapted to whether the alleged wrongful conduct is a negligent tort, an intentional tort, or a violation of public policy evidenced by existing statutory law. If the evidence raises a jury question regarding the employee's negligence, the question might be: Was (defendant)'s employee negligent on (date)? If the alleged wrongful act

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is an intentional tort, the question might be: Did (defendant's employee) commit a battery on (date)? If the court has had to make a legal determination of the public policy behind a statute, the question might be: Did (defendant's employee) (fail to) (describe the act or omission which if proved would violate public policy)?]

Answer:_____
Yes or No

2. If you have answered question 1 "yes," then answer this question. Otherwise do not answer it. Was the (conduct) (negligence) of (defendant's employee) a cause of injury to (plaintiff)?

Answer:_____
Yes or No

3. If you have answered question 2 "yes," then answer this question. Otherwise do not answer it. Was (defendant) negligent in the (hiring) (training) (supervision) of (employee)?

Answer:_____
Yes or No

4. If you have answered question 3 "yes," then answer this question. Otherwise do not answer it. Was such negligence of (defendant) a cause of the (conduct) (negligence) of (defendant's employee) on (date)?

Answer:_____
Yes or No

5. [If the evidence indicates the contributory negligence of plaintiff was a cause of injury, then insert negligence and cause questions as to the plaintiff.]

6. [Negligence comparison question for all parties found causally negligent.]

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7. What sum of money will fairly and reasonably compensate (plaintiff) for the injuries sustained as a natural and probable consequence of the incident on (date) with respect to:

a. Past pain, suffering, and disability $_____

b. Other subparts as required by the evidence $_____

COMMENT

This instruction was approved by the Committee in 1999. The comment was updated in 2010, 2014, 2018, and 2019.

Wrongful Act by Employee. The Committee has substituted "conduct" for "wrongful act" out of concern that a jury might be inclined to make its own determination of what "conduct" is "wrongful." The Miller court has defined this term as follows:

> . . . While we stop short of requiring an underlying tort, we do conclude that there must be an underlying wrongful act committed by the employee as an element of the tort of negligent hiring, training or supervision. A wrongful act may well be a tort, but not necessarily. If the act of the employee is contrary to a fundamental and well-defined public policy as evidenced by existing statutory law, it is sufficient.

Miller v. Wal-Mart Stores, Inc., 219 Wis.2d 250, 263, 580 N.W.2d 233 (1998). Whether employee "conduct" occurred is a question of fact for the jury. Thus, where the evidence indicates the employee may have committed a tort, the elements of the tort should be submitted for jury determination.

However, if the evidence raises a question of violation of "fundamental and well-defined public policy as evidenced by existing statutory law," there may be a threshold question of law presented for court determination: what is the fundamental and well-defined public policy in the statute? After the court has decided this question, the jury may be asked whether the employee did or failed to do what was required by the public policy.

Negligent Hiring, Training, or Supervision Distinguished from Respondeat Superior. ". . . (W)ith a vicarious liability claim, an employer is alleged to be vicariously liable for a negligent act or omission committed by its employee in the scope of employment. See Shannon v. City of Milwaukee, 94 Wis.2d 364, 370, 289 N.W.2d 564 (1980). . . . (V)icarious liability is based solely on the agency relationship of a master and servant. In contrast, with a negligent supervision claim, an employer is alleged to be liable for **a negligent act or omission it has committed** in supervising its employee. Therefore, liability does not result solely because of the relationship of the employer and employee but instead because of the independent negligence of the employer." (Emphasis in original.) L.L.N. v. Clauder, 209 Wis.2d 674, 698-99 n.21, 563 N.W.2d 434 (1997). Also see Doyle v. Engelke, 219 Wis.2d 277, 291 n. 6, 580 N.W.2d 245 (1998).

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When a negligent supervision claim rests solely on an employee's intentional and unlawful act, such as assault and battery, without any separate basis for a negligence claim against the employer, no coverage exists. Accordingly, a negligent supervision claim can qualify as an occurrence only if facts exist showing that the employer's own conduct accidently caused plaintiff's injuries. See Talley v. Mustafa, 2018 WI 47, 381 Wis.2d 393, 423, 911 N.W.2d 55 (2018).

Causation. "With respect to a cause of action for negligent hiring, training, or supervision, we determine that the causal question is whether the failure of the employer to exercise due care was a cause-in-fact of the wrongful act of the employee that in turn caused the plaintiff' s injury. In other words, there must be a nexus between the negligent hiring, training, or supervision and the act of the employee. This requires two questions with respect to causation. The first is whether the wrongful act of the employee was a cause-in-fact of the plaintiff s injury. The second question is whether the negligence of the employer was a cause-in-fact of the wrongful act of the employee." Miller v. Wal-Mart Stores, supra at 262. See also Hansen v. Texas Roadhouse, Inc., 2013 WI App 2, 345 Wis.2d 669, 827 N.W.2d 99.

If the jury finds employee negligence in question 1, there may be situations where the evidence raises a jury question as to whether the negligent conduct of others (including the plaintiff) may also be a cause of plaintiff's injuries. In such cases, the bracketed section in the third and fifth paragraphs may be appropriate. The jury would determine whether the negligence was causal and if so, answer a comparison question.

Negligence Comparison. Where the jury finds causal negligence on the part of the employee, current case law allows recovery from "any of several parties whose negligence combined to cause the injury and also permits the operation of comparative-negligence principles for the allocation of negligence between joint tortfeasors". Mulder v. Acme-Cleveland Corp., 95 Wis. 2d 173, 178, 290 N.W.2d 276 (1980), citing Bielski v. Schulze, 16 Wis.2d 1, 114 N.W.2d 105 (1962). The Committee believes that the causal negligence, if any, of the plaintiff, employer, and employee should be compared under Wis. Stat. § 895.045. The parties should be treated as concurrent rather than successive tortfeasors.

There is a potential for juror confusion in comparing the causal negligence of the plaintiff, the employee, and the defendant employer. The jury is being asked to compare negligence which was a cause of the accident or injury to the plaintiff with negligence which was a cause of the employee's conduct (which was a cause of the accident or injury to the plaintiff). However, the language of the Miller court cited above clearly indicates this approach is to be followed.

Where the jury finds that employee's wrongful act is an intentional tort and further finds employer negligent, both would be jointly liable to the plaintiff. However, negligence-comparison principles would not allow their conduct to be compared. Crest Chevrolet- Oldsmobile-Cadillac, Inc. v. Willemsen, 129 Wis.2d 129, 151, 384 N.W.2d 692 (1986), Schulze v. Kleeber, 10 Wis.2d 540, 545, 103 N.W.2d 560 (1960).

Contribution and Indemnification: A negligent tortfeasor may have a claim for indemnification against an intentional tortfeasor should their concurrent conduct produce damage or injury. Fleming v. Thresherman's Mutual Insurance Company, 131 Wis.2d 123, 388 N.W.2d 908 (1986). An intentional tortfeasor is not entitled to contribution from a negligent tortfeasor. Imark Industries, Inc. v. Arthur Young & Company, 148 Wis.2d 605, 436 N.W.2d 311 (1989), reversing in part and remanding 141 Wis.2d 114, 414 N.W.2d 57 (Ct. App. 1987).

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Comparison. There is no comparison under the comparative negligence statute (§ 895.045) between intentional and negligent tortfeasors. Fleming, supra. For a sample verdict, see JI-Civil 1580.

Cases Involving Joint Tortfeasors and Intentional and Negligent Conduct. Where the jury finds that employee's wrongful act is an intentional tort and further finds employer negligent, both would be jointly liable to the plaintiff. However, negligence-comparison principles would not allow their conduct to be compared. Wis. Stat. 895.045(1) provides only for comparison of negligent conduct. Also see Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen, 129 Wis.2d 129, 151, 384 N.W.2d 692 (1986), Schulze v. Kleeber, 10 Wis.2d 540, 545, 103 N.W.2d 560 (1960).

Also, a negligent tortfeasor may claim indemnification from a joint intentional tortfeasor should their concurrent conduct produce damage or injury. Fleming v. Thresherman's Mutual Insurance Company, et al, 131 Wis.2d 123, 130, 388 N.W.2d 908 (1986). An intentional tortfeasor has no claim for contribution from a joint negligent tortfeasor. Fleming, supra, p. 129, Imark Industries, Inc. v. Arthur Young & Company, 148 Wis.2d 605, 619-620, 436 N.W.2d 311 (1989).

For a sample verdict to use in cases involving intentional and negligent acts of joint tortfeasors, see Wis JI-Civil 1580 (comment).

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1384 DUTY OF HOSPITAL: GRANTING AND RENEWING STAFF PRIVILEGES (CORPORATE NEGLIGENCE)

A hospital owes a duty to its patients to use reasonable care in granting and renewing staff privileges to permit only competent (physicians) and (surgeons) to use its facilities. This duty requires the hospital to use reasonable care to appoint only qualified physicians and surgeons to its medical staff (and to periodically monitor and review their competency). The failure to use reasonable care is negligence.

In investigating the qualifications of doctors applying for staff privileges, the duty of reasonable care requires that a hospital: (1) require an applicant to complete an application; (2) verify the accuracy of the applicant's statements especially in regard to the applicant's medical education, training, and experience; (3) solicit information from the applicant's peers, including those not referenced in the application, who are knowledgeable about the education, training, experience, health, competence, and ethical character of the applicant; (4) determine if the applicant is currently licensed to practice in this state and if the applicant's licensure or registration has been or is currently being challenged; (5) inquire whether the applicant has been involved in adverse medical malpractice actions and whether the applicant has lost (his) (her) membership in any medical organizations or privileges at any other hospital.

A hospital must evaluate the information gained through its investigation and make a reasonable judgment to approve or deny an application for staff privileges. With respect to its investigation and evaluation, the hospital must gather and evaluate all of the facts and

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knowledge that would have been acquired had it exercised reasonable care in investigating its medical staff applicants.

[Hospitals are not insurers of the competency of their medical staff. If the hospital exercised the degree of care, skill, and judgment as required of it, it cannot be found negligent simply because a member of its medical staff acted in a negligent manner.]

COMMENT

This instruction and comment were originally approved in 1988. The instruction and comment were revised in 1998. The comment was updated in 2017.

This instruction is based on the decision of the supreme court in Johnson v. Misericordia Community Hosp., 99 Wis.2d 708, 301 N.W.2d 156 (1981).

Standard of Care. The standard of ordinary care under the circumstances expressed in Osborn v. Montgomery, 203 Wis. 223, 234 N.W. 372 (1931) applies to hospitals. Johnson, supra at 738; Schuster v. St. Vincent Hosp., 45 Wis.2d 135, 172 N.W.2d 421 (1969). The revision to this instruction in 1998 changed the standard of "average hospital" to "reasonable hospital." See Nowatske v. Osterloh, 198 Wis.2d 419, 543 N.W.2d 25 (1996).

Need for Expert Testimony. In establishing the negligence of a hospital, the necessity for expert testimony depends upon the type of negligent acts involved. Expert testimony should be adduced concerning those matters involving special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of mankind and which requires special learning, study, or experience. Payne v. Milwaukee Sanitarium Found., Inc., 81 Wis.2d 264, 272, 260 N.W.2d 386 (1977). See also Walker v. Sacred Heart Hospital, Appeal No. 2015AP805. Because the procedures ordinarily used by hospitals to evaluate applications for staff privileges are not within the realm of the ordinary experience of mankind, expert testimony is generally required to prove negligence. Johnson, supra at 739. However, not every case will require expert testimony, e.g., where the hospital has made no effort to investigate the applicant.

Bifurcation of Trial. If at the pretrial, the plaintiff indicates that evidence will be presented relating to prior bad acts of medical treatment by the doctor to show the hospital's negligence, then bifurcation of the claims against the doctor and the hospital should be considered to prevent prejudice against the doctor. See Wis. Stat. § 904.03. Under this bifurcated format, the case against the doctor would be presented first. If the doctor is not negligent, then the trial is over unless there are claims against hospital employees (e.g., nurses or residents). The second phase would cover the hospital's negligence, comparison of negligence, and damages. The same jury should hear both phases of the trial.

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1385 NEGLIGENCE: HOSPITAL: DUTY OF EMPLOYEES: PERFORMANCE OF ROUTINE CUSTODIAL CARE NOT REQUIRING EXPERT TESTIMONY

Question _____ asks if (hospital) was negligent in caring for (plaintiff)?

A hospital is responsible for the negligence of its employees. A hospital employee must use ordinary care in providing the services and attention to a patient required under the circumstances. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.

In determining if the hospital's (employee)(s) (was) (were) negligent, you should consider (plaintiff)'s condition and whether the condition was known to (employee)(s), and if not, whether the condition should have been known to (employee)(s) had the (employee)(s) used ordinary care in performing (his) (her) (their) duties.

In answering these questions, you may consider the following:

- any information about the patient which was transmitted to the hospital by members of the patient's family or by the person who brought the patient to the hospital,
- what the patient says or does while in the hospital,
- the records kept by the hospital which were readily available to the employee(s), and
- any other information or instructions the employee(s) had at that time.

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If, after considering all of the evidence, you find that employee(s) (was) (were) negligent, then (hospital) was negligent.

COMMENT

The instruction and comment were originally published in 1971. This revision was approved by the Committee in 1999.

Dahlberg v. Jones, 232 Wis. 6, 285 N.W. 841 (1939); Carson v. Beloit, 32 Wis.2d 282, 145 N.W.2d 112 (1966); Schuster v. St. Vincent Hosp., 45 Wis.2d 135, 172 N.W.2d 421 (1969); Cramer v. Theda Clark Memorial Hosp., 45 Wis.2d 147, 172 N.W.2d 427 (1969); Eden v. LaCrosse Lutheran Hosp., 53 Wis.2d 186, 191 N.W.2d 715 (1971); Wills v. Regan, 58 Wis.2d 328, 206, N.W.2 d 398 (1973); Dumer v. St. Michael's Hosp., 69 Wis.2d 766, 233 N.W.2d 372 (1975); Payne v. Milwaukee Sanitarium Found., Inc., 81 Wis.2d 264, 260 N.W.2d 386 (1977); Froh v. Milwaukee Medical Clinic, S.C., 85 Wis.2d 308, 270 N.W.2d 83 (Ct. App. 1978).

The duty of care owed a patient by a hospital is one of ordinary care under the circumstances. Payne v. Milwaukee Sanitarium Found., Inc., supra at 272. However, in applying the ordinary care standard, there is a recognized distinction between medical care and custodial or routine hospital care. Thus in Payne, the court noted that:

> Where the patient requires nursing or professional hospital care, then expert testimony as to the standard of that care is necessary.
>
> However, the standard of nonmedical, administrative, ministerial or routine care in a hospital need not be established by expert testimony.

This need for expert testimony with respect to medical care was repeated by the court later in the decision:

> In establishing the negligence of a hospital the necessity of expert testimony depends upon the type of negligent acts involved. Expert testimony should be adduced concerning those matters involving special knowledge or skill or experience on subjects that are not within the realm of ordinary experience of mankind, and which requires special learning, study or experience. Payne v. Milwaukee Sanitarium Found., Inc., 81 Wis.2d 264, 276 N.W.2d 386 (1977).

See also Kujawski v. Arbor View Center, 139 Wis.2d 455, 407 N.W.2d 249 (1987); "Necessity of Expert Testimony to Support Action against Hospital for Injury to or Death of Patient," 40 A.L.R.3d 515 (1971).

This instruction should be used only in actions against a hospital for negligent conduct that does not amount to malpractice. It should be given only where the hospital nurse or employee was in performance of custodial, housekeeping, or routine duties. Examples of these duties are discussed in Schuster v. St. Vincent Hosp., supra; Cramer v. Theda Clark Memorial Hosp., supra; Kujawski v. Arbor View Center, supra.

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For example, in Cramer and Kujawski, the court said where a nurse leaves a patient unattended and under inadequate restraint involves matters of routine care and does not require expert testimony. The use or non-use of restraints requires expert testimony only where the decision to leave a patient unattended is a matter of therapy. Kujawski, supra at 468.

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1385.5 NEGLIGENCE: HOSPITAL: DUTY OF EMPLOYEES: SUICIDE OR INJURY RESULTING FROM ESCAPE OR ATTEMPTED SUICIDE

Question _____ asks if (hospital) was negligent in caring for (plaintiff)?

A hospital is responsible for the negligence of its employees. A hospital employee is negligent when (he) (she) fails to use reasonable care in providing for the hospital's patients. Reasonable care is that care which a person of ordinary intelligence and prudence would provide under the same or similar circumstances considering a patient's physical and mental condition.

A hospital has the duty to restrain or guard a patient only if employees knew, or in the exercise of reasonable care should have known, the propensity of the patient for (suicide, escape, self injury). In determining whether (employee[s]) knew or should have known of the possibility of (suicide, escape, self injury) you should consider information received by (employee[s]) from the attending physician, members of the family, persons who brought the patient to the hospital, the conduct and statements of the patient while in the hospital, as well as all the circumstances under which the patient was admitted to the hospital.

If, after consideration of all of the evidence, you find that (employee[s]) (was) (were) negligent, then (hospital) was negligent.

Question ____ asks whether at the time of the incident causing injury to (plaintiff) the (hospital) did know or should have foreseen the particular risk of harm that led to (plaintiff)'s injury. In determining whether the employee(s) of (hospital) knew or should have foreseen the particular risk of harm, you should consider information received by the employee(s) from the attending physician, the conduct and statements of (plaintiff) while in the hospital, as well the circumstances under which (plaintiff) was admitted to the hospital. A hospital

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is under no duty to take special precautions when there is no reason to anticipate the particular risk of harm. To answer this question "yes," you must be satisfied by the greater weight of the credible evidence, to a reasonable certainty, that the employee(s) of the hospital knew or should have foreseen the particular risk of harm to (plaintiff) from (suicide, escape, self-injury).

Question ____ asks whether (plaintiff) was negligent with respect to (his) (her) safety. Generally, every person in all situations has a duty to exercise ordinary care for his or her own safety. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something or fails to do some thing that a reasonable person would recognize as creating an unreasonable risk of injury or damage to (himself)(herself).

This general rule of ordinary care is modified where the plaintiff has a mental disability, is under the custody and control of a hospital, and the hospital is negligent in not foreseeing a particular risk of harm in caring for the plaintiff. In these circumstances, plaintiff's duty to exercise ordinary care for his or her own safety is that of a reasonable person with the plaintiff's mental disability in similar circumstances.

There are circumstances in which mentally disabled persons are as able to appreciate danger as any other person and are able to control their actions. You must consider (plaintiff)'s mental state at the time of the accident. (Plaintiff) is negligent if (plaintiff) did something or failed to do something that a reasonable person with (plaintiff)'s mental disability would recognize as creating an unreasonable risk of harm.

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Question ____ asks whether (plaintiff) was totally unable to appreciate the risk of harm that led to (his)(her) injury and the duty to avoid that risk.

This question asks you to consider (plaintiff)'s mental state at the time of the accident, including the capacity of (plaintiff) to appreciate (his)(her) own conduct. (Plaintiff) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (he)(she) was utterly incapable of conforming (his)(her) conduct to the standard of ordinary care.

In answering this question, you should consider any observations of (plaintiff) noted by the attending physician, members of the family or persons who brought (plaintiff) to the hospital; (plaintiff)'s conduct and statements while at the hospital; the circumstances under which (plaintiff) was admitted to the hospital, including any diagnosis; and all other evidence received at trial bearing on (plaintiff)'s condition at the time of the accident.

[Insert where applicable: The evidence indicates that (plaintiff) was involuntarily committed. This does not necessarily establish that (he)(she) was so mentally disabled that (he)(she) lost (his)(her) mental capacity to appreciate the risk of harm from (his)(her) own conduct and the duty to avoid it. You must decide whether (plaintiff)'s mental disability which resulted in (his)(her) commitment was such that (plaintiff) was rendered incapable of appreciating the risk of harm and the duty to avoid that risk.]

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SPECIAL VERDICT

Question 1: Was (defendant) negligent in caring for (plaintiff)?

Answer: _____
Yes or No

If you answered Question No. 1 "Yes" then answer Question No. 2. If you answered Question No. 1 "No" do not answer any other Questions.

Question 2: Was (defendant)'s negligence a cause of (plaintiff)'s injury?

Answer: _____
Yes or No

If you answered Question No. 2 "Yes" then answer Question No. 3. If you answered Question No. 2 "No" do not answer any other Questions.

Question 3: At the time of the incident causing injury to (plaintiff) was (he) (she) in the custody and control of (defendant)?

Answer: _____
Yes or No

If you answered Question No. 3 "Yes" then answer Question No. 4. If you answered Question No. 3 "No" then go to Question No. 7.

Question 4: At the time of the incident causing injury to (plaintiff), did (defendant) know or should (defendant) have foreseen the particular risk of harm that led to (plaintiff)'s injury?

Answer: _____
Yes or No

If you answered Question No. 4 "Yes" then answer Question No. 5. If you answered Question No. 4 "No" then go to Question No. 7.

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Question 5: Was (plaintiff) negligent with respect to (his)(her) safety? *

Answer: _____
Yes or No

If you answered Question No. 5 "Yes" then answer Question No. 6. If you answered Question No. 5 "No" then go to Question No. 10.

Question 6: Was (plaintiff) totally unable to appreciate the risk of harm that led to (his) (her) injury and (his) (her) duty to avoid that risk?

Answer: _____
Yes or No

If you answered Question No. 6 "Yes" then go to Question No. 10. If you answered Question No. 6 "No" then go to Question No. 8.

Question 7: Was (plaintiff) negligent with respect to (his) (her) safety? **

Answer: _____
Yes or No

If you answered Question No. 7 "Yes" or Question No. 6 "No", then answer Question No. 8. If not, go to Question No. 10.

Question 8: Was (plaintiff)'s negligence a cause of (his) (her) injury?

Answer: _____
Yes or No

If you answered "Yes" to Question Nos. 2 and 8, then answer this question. If not, go to Question No. 10.

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Question 9: Taking the total negligence that caused (plaintiff)'s injury to be 100%, what percentage do you attribute to:

a. Plaintiff _____%

b. Defendant _____%

TOTAL 100%

If you answered Question No.2 "Yes" then answer this question. Otherwise do not answer it.

Question 10: What sum of money will fairly and reasonably compensate (name of plaintiff) for (his) (her) injury?

$_____

* Subjective negligence standard

** Objective negligence standard

COMMENT

This instruction and comment were approved in 2005.

This instruction is based on the decision in Hofflander v. St. Catherine's Hospital, Inc., 2003 WI 77, 262 Wis.2d 539, 664 N.W.2d 545. The Hofflander decision involved a claim of a mentally disabled person who was injured while trying to escape an emergency detention facility. The supreme court concluded:

> ¶35. A person who is mentally disabled is held to the same standard of care as one who has normal mentality. An exception to this rule may exist when a mentally disabled person is under the protective custody and control of another. When a mentally disabled plaintiff relies on this exception to seek recovery for a self-caused injury, the plaintiff must establish that (1) a special relationship existed between the defendant caregiver and the plaintiff, giving rise to a heightened duty of care; and (2) the defendant caregiver knew or should have foreseen the particular risk of harm that led to the plaintiff's injury. If a special relationship existed but the defendant could not have foreseen the particular risk of harm, then the defendant is entitled to assert the affirmative defense of contributory negligence, and the fact finder should evaluate the comparative negligence of the parties using an objective standard of care.

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¶36. However, if a special relationship did exist, the particular risk of harm was foreseeable, and there is some evidence that the defendant caregiver failed to exercise the duty of care that was required under these circumstances, the finder of fact should compare the defendant's negligence to the plaintiff's contributory negligence using a subjective standard to evaluate the mentally disabled plaintiff's duty of self care. In this situation, if the mentally disabled plaintiff is able to show that she was totally unable to appreciate the risk of harm and the duty to avoid it, the plaintiff's contributory negligence should not be compared to the negligence of the defendant. It should be expunged as a matter of law.

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1390 INJURY BY DOG:

[Suggested Preliminary Instructions: Wis JI-Civil 100, 110, 115, 120, 125, 215, 145, and 200]

(Plaintiff) alleges that (Defendant) is liable for injuries caused (Plaintiff) by a dog, based on section 174.02, Wisconsin Statutes, which states in part, that the owner of a dog is liable for the full amount of damages caused by the dog injuring or causing injury to a person, domestic animal or property. Before you may find a person who owns a dog liable, you must first find that (Plaintiff) suffered an injury to (his) (her) person, domestic animal or property and that the dog caused injury.

Question No. 1 on the verdict asks whether (Defendant) "owned," "harbored," or "kept" the dog. (Defendant) claims that (he) (she) did not "own," "harbor," or "keep" the dog that injured (Plaintiff). You must decide whether (Defendant) "owned," harbored," or "kept" the dog, and to do so you must look to all of the evidence presented. A person need not be the legal owner of a dog to keep or harbor the dog. A person keeps a dog if (he) (she) exercises a measure of care, custody, or control over the dog. A person's status as a keeper can change over time, with the focal point being the time of the injury. A person harbors a dog if (he) (she) shelters or gives refuge to a dog. Neither the casual presence of dogs on one's property, a meal of mercy to a stray dog, nor the mere ownership of the property on which the dog resides makes one a keeper or harborer. There must be evidence that (Defendant) furnished the dog with shelter, protection, or food or exercised some degree of control over the dog or the property where the dog resides.

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Question No. 2 on the verdict asks whether the actions of (Defendant)'s dog were a cause of injury to (Plaintiff). This question does not ask about "the cause" but rather "a cause" because an injury may have more than one cause. The actions of a dog were a cause of injury if they were a substantial factor in producing the injury. An injury may be caused by the actions of a dog or by the negligence of a person or by the combined actions of a dog and the negligence of a person.

A person's injury by a dog may involve negligence on (his) (her) own part. Question No. 3 asks about that. You must determine the extent of (Plaintiff)'s negligence, if any, with respect to (his) (her) own safety, at or before the contact with (Defendant)'s dog. A person is negligent when (he) (she) fails to exercise ordinary care. Every person in all situations has a duty to exercise ordinary care for (his) (her) own safety. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent if the person does something or fails to do something that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property. This does not mean that a person is required at all hazards to avoid injury; a person must, however, exercise ordinary care to take precautions to avoid injury to (himself) (herself).

If you answer question No. 3 on the verdict "yes," finding that (Plaintiff) was negligent with respect to (his) (her) own safety, then you will need to answer question No. 4. That question asks whether (Plaintiff)'s negligence was a cause of (his) (her) injury. Please note that this question does not ask about "the cause" but rather "a cause" because an injury may have more than one cause. Someone's negligence was a cause of (his) (her) injury

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if it was a substantial factor in producing the injury. An injury may be caused by the actions of a dog, by the negligence of a person, or by the combined actions of a dog and the negligence of a person.

If, by your previous answers, you are required to answer question No. 5, you will determine how much and to what extent (Defendant)'s dog and (Plaintiff)'s negligence are to blame for causing the injury. You will decide the percentage (a portion of 100%) attributable to each party in causing the injury.

The burden of proof on these subdivisions is on the party who asserts the percentage of causal negligence attributable to the other, and that party must satisfy you by the greater weight of the credible evidence, to a reasonable certainty, what your answer should be.

You must answer question No. 6, the damage question no matter how you answered any of the previous questions in the verdict. The amount of damages, if any, found by you should in no way be influenced or affected by any of your previous answers to questions in the verdict.

[I have answered question 6(a) because the parties have agreed on the amount to be inserted. You should not conclude from the fact I have answered this question as to the amount of damages that any party has admitted fault or that any party may be responsible for the amount inserted. Finally, you should not assume that because I have answered this question, that a party already has or necessarily will recover this amount. Parties, may, as here, agree on an amount of damages without admitting they are responsible for the damages.]

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In answering the damage questions, completely disregard any percentages which you may have inserted as your answers to the subdivisions of question No. 5, the comparison question.

In answering the damage questions, be careful not to include or duplicate in any answer amounts included in another answer made by you or me.

Your answers to the damage questions should not be affected by sympathy or resentment or by the fact that one of the parties from whom damages are sought is an insurance corporation; nor should you make any deductions because of a doubt in your minds as to the liability of any party to this action.

In considering the amount to be inserted by you in answer to each damage question, the burden of proof rests upon each person claiming damages to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that the person sustained damages with respect to the element or elements mentioned in the questions and the amount of the damages. The greater weight of the credible evidence means that the evidence in favor of an answer has more convincing power than the evidence opposed to it. Credible evidence means evidence you believe in light of reason and common sense. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. The amount inserted by you should reasonably compensate the person for the damages from the incident.

Determining damages for pain and suffering cannot always be made exactly or with mathematical precision; you should award damages in an amount which will fairly compensate (Plaintiff) for (his) (her) injuries.

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The amount you insert in answer to each damage question is for you to determine from the evidence. What the attorneys ask for in their arguments is not a measure of damages. The opinion or conclusions of counsel as to what damages should be awarded should not influence you unless it is sustained by the evidence. Examine the evidence—carefully and dispassionately—and determine your answers from the evidence in the case.

Question 6(a) asks what sum of money will fairly and reasonably compensate (Plaintiff) for past medical expenses. You will insert as your answer the sum of money you find has reasonably and necessarily been incurred from the date of the incident up to this time for the care of the injuries sustained by (Plaintiff) as a result of the incident.

Billing statements (which may include invoices) for health care services (Plaintiff) has received since the accident have been admitted into evidence.

[**NOTE: Use the following paragraph if no evidence has been received disputing the value, reasonableness, or necessity of health care services provided to plaintiff:** These billing statements establish the value, reasonableness, and necessity of health care services provided to (Plaintiff). You must still determine whether the health care services were provided for the injuries sustained by (Plaintiff) as a result of the incident.]

[**NOTE: Use the following paragraph if evidence has been received disputing the value, reasonableness, or necessity of health care services provided to plaintiff:** The party challenging the (value of) (reasonableness and necessity of) (Plaintiff)'s past health care services has the burden to prove they were not (reasonable in amount) (reasonably and necessarily provided to care for (Plaintiff)). Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that the billing statements (were not

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reasonable in amount) (do not reflect health care services reasonably and necessarily provided to care for (Plaintiff)), you must find (the billing statements reflect the reasonable value of the health care services) (the health care services reflected in the billing statements were reasonably and necessarily provided to care for (Plaintiff)). You must still determine whether the medical expenses were provided for the injuries sustained by (Plaintiff) as a result of the accident.]

Question 6(b) asks what sum of money will fairly and reasonably compensate (Plaintiff) for past pain, suffering, and disability. Your answer to this subdivision should be the amount of money that will fairly and reasonably compensate (Plaintiff) for the pain, suffering, and disability (he) (she) has suffered from the date of the incident up to this time as a result of the incident.

Pain, suffering, and disability includes any physical pain, humiliation, embarrassment, worry, and distress which (Plaintiff) has suffered in the past. You should consider to what extent (his) (her) injuries impaired (his) (her) ability to enjoy the normal activities, pleasures, and benefits of life.

Question 6(c) asks what sum of money will fairly and reasonably compensate (Plaintiff) for future pain, suffering, disability.

If you are satisfied that (Plaintiff) will endure pain, suffering, and disability, in the future as a result of the incident, you will insert as your answer to this subdivision the sum of money you find will fairly and reasonably compensate (Plaintiff) for this future pain, suffering, and disability.

Pain, suffering, and disability includes:

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- physical pain
- worry
- distress
- embarrassment
- humiliation

In answering this damage question, you should consider the following factors:

- the extent (Plaintiff)'s injuries have impaired and will impair (his) (her) ability to enjoy the normal activities, pleasures, and benefits of life;
- the nature of (Plaintiff)'s injuries;

the effect the injuries are reasonably certain to produce in the future, bearing in mind (Plaintiff)'s age, prior mental and physical condition, and the probable duration of (his) (her) life.

In answering questions 7 and 8, you must determine whether (dog), prior to (date), bit a person without provocation and with sufficient force to break the skin and cause permanent scarring or disfigurement. If you are required to answer questions 9 and 10, you must decide whether (Defendant), knew or was notified that (dog), previously bit a person without provocation and with sufficient force to cause permanent scarring or disfigurement.

[Follow with Wis JI-Civil 1735, 180, and 190]

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SPECIAL VERDICT

QUESTION NO. 1. Did (Defendant) own, harbor, or keep (dog) at the time of the injury to (Plaintiff)?

Answer: _____
Yes or No

QUESTION NO. 2. Was (Defendant)'s (dog) a cause of injury to (Plaintiff)?

Answer: _____
Yes or No

QUESTION NO. 3. At and before the contact with (Defendant)'s dog, was (Plaintiff) negligent with respect to (his) (her) own safety?

Answer: _____
Yes or No

If you answered question No. 3 "yes," answer this question:

QUESTION NO. 4. Was (Plaintiff)'s negligence a cause of injury to (him) (her)?

Answer: _____
Yes or No

If you have answered question No.'s 2 & 4 "yes," please answer the following question:

QUESTION NO. 5. Assuming the conduct of (Defendant)'s (dog) and (Plaintiff)'s negligence caused 100% of (Plaintiff)'s injuries, what percentage do you attribute to:

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(a) (Defendant)'s (dog) _____

(b) (Plaintiff) _____

Total 100%

Answer the following question no matter how you answered the previous questions.

QUESTION NO. 6. What sum of money will fairly and reasonably compensate (Plaintiff) for (his) (her) injuries with respect to:

a. Past Medical Expenses $_____

b. Past Pain, Suffering & Disability $_____

c. Future Pain, Suffering & Disability $_____

QUESTION NO.7 Did (dog) bite (Plaintiff) with sufficient force to break the skin?

Answer: _____
Yes or No

If "Yes," then answer Question No. 8.

QUESTION NO. 8. Did the bite cause permanent physical scarring or disfigurement?

Answer: _____
Yes or No

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If "Yes," then answer Question No. 9.

QUESTION NO. 9. Did (dog) prior to (date) and without provocation, bite a person with sufficient force to break the skin and cause permanent physical scarring or disfigurement?

Answer: _____
Yes or No

If "Yes," then answer Question No. 10.

QUESTION NO. 10. Did (Defendant) know or was (he)(she) notified that (dog) had previously and without provocation bit a person with sufficient force to break the skin and cause permanent physical scarring or disfigurement?

Answer: _____
Yes or No

Dated at_____, Wisconsin, this day of , 20__.

_____
Presiding Juror

Dissenting Juror(s) (if any): Questions or Subdivision to which Juror Dissents

_____ _____

_____ _____

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COMMENT

This instruction has been completely re-created in light of 2015 Wisconsin Act 112 which changed Chapter 174 of the statutes as it relates to double damages. Effective November 13, 2015, the legislature removed "domestic animal" or "property" from the double damages provision under Wis. Stat. § 174.02(1)(b) and changed the "prior injury" standards. Only dog "bites" to a "person" are now eligible for double damages and that eligibility is further narrowed by the following conditions:

A "person" injured by a dog is eligible for double damages only if;
1. The injury is from a "bite" that had sufficient force to break the skin, and
2. The bite caused a "physical scar" or "disfigurement."

The Act also provides that the prior known "dog bite" had to be "without provocation," to a "person" (not a domestic animal or property) and had to be a bite that was of sufficient force to have broken the skin and left a scar or disfigurement. *See* § 174.02(1)(b). Prior to 15 Wis. Act 112, the plaintiff only had to prove that the owner was "notified" or knew that the dog had previously injured or caused injury to a person, domestic animal or property.

OLD DOUBLE DAMAGES	NEW DOUBLE DAMAGES
1. "injuring"	"biting" – sufficient force to break the skin
2. "causing injury"	cause scarring or disfigurement
3. "previously injured"	"without provocation bite"
4. Person/domestic animal/property	person

A claim for a dog injury *without notice* of prior injury (§174.02(1)(a)) is a jury claim as a claim for a dog's injury to one's person, property or domestic animal has long been known to exist in common law. The legislature is silent in §174.02, however, as to whether a statutory claim for a dog bite *after notice* is a jury claim. See *Wis JI-Civil 1 Right to a Jury Trial: Law Note for Trial Judges* for further discussion regarding the analysis of the constitutional right to a jury trial in statutory claims. Given our history of treating §174.02(1)(b) *after notice* dog bites as a jury issue, we recommend that Questions 7, 8, 9, and 10 continue to be answered by the jury.

Strict Liability. The dog injury statute, Wis. Stat. § 174.02(1)(a), imposes strict liability on the owner of a dog who injures another person, domestic animal, or property. *See* Campenni v. Walrath, 180 Wis. 2d 548, 509 N.W.2d 725 (1994); Pattermann v. Pattermann, 173 Wis. 2d 143, 496 N.W.2d 613 (Ct. App. 1992). While imposing strict liability, the statute does not impose absolute liability. Issues regarding causation and comparative negligence must still be examined. Questions 1 and 2 may often be answered as a matter of law. Questions 3 and 4 inquire about contributory negligence on the part of the Plaintiff and whether the Plaintiff's negligence was causal to (his) (her) injury. Question 5 asks the jury to compare the contributory negligence of the Plaintiff with the strict liability of the dog's owner. Such a comparison of negligence and strict liability is common in product liability actions. *See* Wis JI-Civil 3268 and 3290. Question 6 is a standard damages question. Questions 7-10 are to be given if there is a claim for double damages and evidence that such a prior injury occurred.

"Owner" as defined under Wis. Stat. § 174.001(5). An issue that has caused significant controversy is who is considered to be a "owner," "harborer," or "keeper" of a dog. *See* Wis. Stat. §

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174.001(5). In Armstrong v. Milwaukee Mutual Insurance Co., 202 Wis. 2d 258, 549 N.W.2d 723 (1996), the court discussed who is a "keeper" of a dog. The court said that upon review of earlier Wisconsin case law, it concluded that several factors are critical in determining who is a keeper and, therefore, an owner within the confines of ch. 174. First, the person in question must exercise some measure of custody, care, or control over the dog; however, a person's status as a keeper can change over time and the focal point for the jury is the time of the injury. The purpose of Wis. Stat. § 174.02 is to protect those people who are not in a position to control a dog, rather than to protect those persons who are statutorily defined as owners.

A person who is employed to care for a dog is a "keeper" of that dog within the statutory definition of Wis. Stat. § 174.001(5). An owner injured while in control of the dog may not use the statute to hold another owner liable. Where there is negligence by the owner, a keeper may pursue a common law negligence claim against the owner.

In Fifer v. Dix, 2000 WI App 66, 234 Wis. 2d 117, 608 N.W.2d 740, a dog's owner loaned his dog to another individual. While the dog was in the control of the individual, it bit the plaintiff. The plaintiff argued that the owner of the dog was strictly liable under Wis. Stat. § 174.02(1) for the injuries the plaintiff incurred as a result of the bite. The defendant-owner argued that under Armstrong, an owner who is not negligent and is not exercising control over his or her dog cannot be held liable under § 174.02 for injuries incurred by a third person. The court concluded that the plain language of the statute unambiguously imposes strict liability on a dog owner whose dog injures a person who is neither its owner nor its keeper, and nothing in the Armstrong decision precludes the defendant-owner from being found liable to the plaintiff under the statute.

In Fire Insurance Exchange v. Cincinnati Insurance Co., 2000 WI App 82, 234 Wis. 2d 314, 610 N.W.2d 98, the court concluded that an owner of a dog may sue a keeper for contribution when an innocent third party has been injured. The court said the statute imposes liability on anyone who owns, keeps, or harbors a dog who injures a third party. Reading the statute to allow both owners and keepers to be liable, the court said, comports with the statute's policy of assigning responsibility to those in a position to protect innocent third parties from dog bites. Once two parties are liable to the person whom the dog has bitten, they are joint tortfeasors to whom a right of contribution accrues where one pays more than that party's fair share of the damages caused. *Id.*, ¶17.

Wis. Stat. § 174.02 is inapplicable where a person trips over a sleeping dog. Alwin v. State Farm Fire & Cas. Co., 2000 WI App 92, ¶14, 234 Wis. 2d 441, 610 N.W.2d 218. The court found that to impose liability upon a dog owner for injuries arising solely from a person tripping over a sleeping dog would effectively result in a pure penalty for dog ownership. *Id.*

In Pawlowski v. American Family Mutual Insurance Co., 2009 WI 105, 322 Wis. 2d 21, 777 N.W.2d 67, the court considered whether a homeowner who allows a dog owned by someone else to reside in her home is a person who either "harbors" or "keeps" a dog. In Pawlowski, the unleashed dog injured a third party after the dog was allowed out of the house by its legal owner. The court concluded that the homeowner "harbored" the dog and was thus a statutory "owner" of the dog under Wis. Stat. § 174.02 at the time of the dog bite incident. The court found that the homeowner's status as a harborer of the dog was not extinguished when the dog's legal owner took momentary control of the dog. *Id.*, ¶7.

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In contrast, a landlord is not liable in negligence for injuries caused by a tenant's dog, unless the landlord is an owner or keeper of that dog. Ladewig v. Tremmel, 2011 WI App 111, 336 Wis. 2d 216, 802 N.W.2d 511. In Augsburger v. Homestead Mutual Insurance Co., 2014 WI 133, 359 Wis. 2d 385, 856 N.W.2d 874, the court concluded that mere ownership of the property on which a dog resides is not sufficient to establish that an individual is an owner of a dog under Wis. Stat. § 174.02. The totality of the circumstances determines whether the legal owner of the property has exercised the requisite control over the property to be considered a harborer and thus an owner under the statute. *Id.*, ¶22.

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1391 LIABILITY OF OWNER OR KEEPER OF ANIMAL: COMMON LAW

An owner (keeper) of a(n) (insert name of animal) is deemed to be aware of the natural traits and habits which are usual to a(n) (name of animal) and must use ordinary care to restrain and control the animal so that it will not in the exercise of its natural traits and habits cause injury or damage to the person or property of another.

In addition, if an owner (keeper) is aware or in the exercise of ordinary care should be aware that the animal possesses any unusual traits or habits that would be likely to result in injury or damage, then the owner (keeper) must use ordinary care to restrain the animal as necessary to prevent the injury or damage.

(A person is said to be a keeper of an animal if, even though not owning the animal, the person has possession and control of it or if the person permits another person who is a member of his or her family or household to maintain the animal on his or her premises.)

SPECIAL VERDICT

1. Did (defendant) own or keep (animal)?

Answer: _____

Yes or No

2. Did (animal) cause injury or damage to the person or the property of another?

Answer: _____

Yes or No

(Verdict continued on page 2)

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If the answer to both question 1 and question 2 is "yes":

3. Was the injury or damage due to the animal's exercise of its natural traits and habits?

Answer: _____

Yes or No

If the answer to question 3 is "yes":

4. Did (defendant) use ordinary care to restrain and control the animal?

Answer: _____

Yes or No

COMMENT

This instruction and comment were approved by the Committee in 1974. The special verdict was added in 2016. The comment was updated in 1990, 1994, 1995, 2001, 2004, 2013, and 2015.

Control of Animal. This instruction sets forth the duty of the person who has control over the animal. White v. Leeder, 149 Wis.2d 948, 440 N.W.2d 557 (1989). It is not designed to set forth a duty as between the owner and keeper of an animal.

This instruction covers a claim based on common law negligence. The owner is also liable where the damage caused by the animal was caused by poor care and treatment of the animal. Denil v. Coppersmith, 117 Wis.2d 90, 343 N.W.2d 136 (Ct. App. 1983).

Stallions; Bulls; Boars; Rams; Goats. For liability of an owner or keeper for damage by a stallion over one year, a bull over six months, boar, ram, or billy goat over four months which runs at large, see Wis. Stat. § 172.01. The statute creates strict liability; no showing of fault by the owner is required. See also Leipske v. Guenther, 7 Wis.2d 86, 88, 95 N.W.2d 774 (1959).

For injuries caused by a horse on a highway, see Templeton v. Crull, 16 Wis.2d 416, 144 N.W.2d 843 (1962). For injuries caused by a muskie, see Ollhoff v. Peck, 177 Wis.2d 719, 503 N.W.2d 323 (Ct. App. 1993).

For the negligence of a riding or stable master, see Smith v. Pabst, 233 Wis. 489, 288 N.W. 780 (1940).

Facts evidencing "unusual traits and habits likely to result in injury" are discussed in Denil v. Coppersmith, supra.

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Owners and Keepers. The casual presence of a dog on someone's premises does not make that person an owner or keeper. Patterman v. Patterman, 173 Wis.2d 143, 496 N.W.2d 613 (Ct. App. 1992).

This instruction does not distinguish between domesticated and wild animals but rather instructs the jury to hold owners of animals to the appropriate standard of care given the nature of the animal involved. See Ollhoff v. Peck, 177 Wis.2d 719, 503 N.W.2d 323 (Ct. App. 1993)

The terms "owner" and "keeper" are defined in Koetting v. Conroy, 223 Wis. 550, 270 N.W. 625 (1937). See also White v. Leeder, supra at 957-58; Patterman v. Patterman, supra; Augsburger v. Homestead Mutual Ins. Co., 2014 WI 133, 359 Wis.2d 385, 856 N.W.2d 874. "Harboring" an animal lacks the proprietary aspect of keeping, Patterman, supra, at 149 n.4.

White v. Leeder, supra, contains the following discussion of the common law negligence rule with respect to animals.

> .... At common law, the cases have established that the owner or keeper of a domesticated animal is held to anticipate the general propensities of the class to which the animal belongs, as well as any unusual traits or habits of the individual animal. See Leipske v. Guenther, 7 Wis.2d 86, 88, 95 N.W.2d 774, 96 N.W.2d 821 (1959).
>
> The common-law rule first requires the owner or keeper to use ordinary care in controlling the characteristics normal to the animal's class. The owner or keeper of a bull is thus required to take greater precautions to keep it under effective control than would be required of the owner of a cow or steer. See Restatements, Second, Torts, sec. 518, comment g, p. 31 (1977).
>
> The common-law rule further allows the plaintiff to show that the individual animal had vicious or mischievous propensities and that the owner or keeper knew or should have known of them. A vicious propensity is a tendency of an animal to do any act which might endanger the safety of persons or property in a given situation. See 3A C.J.S. Animals, sec. 180, p. 674 (1973).

Contributory Negligence. The doctrine of contributory negligence applies to plaintiff's actions. White v. Leeder, supra at 958.

Expert Testimony. In White v. Leeder, supra, the court agreed with the trial court that technical expert testimony was not required to establish causal negligence. The court said that the issues involving whether the matter in which the owner kept a bull negligently caused the plaintiff's injury was within the realm of comprehension.

Damages. A claim by an injured keeper against a dog's owner for common law negligence, is not governed by the damage provisions in the dog bite statute § 174.02. Malik v. American Family Ins. Co., supra, ¶ 31. The court concluded that the trial court correctly ruled that since the keeper's claim under § 174.02 was dismissed, she could not recover double damages under § 174.02(1)(b) even if she prevailed on the remaining common law negligence claim. Malik, 2001 WI App 82, ¶ 10.

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Liability of Landowner or Landlord. In Smaxwell v. Bayard, 2004 WI 101, the court limited liability arising from injuries caused by dogs. The court held, on public policy grounds, that landowners and landlords can be held liable only if they are the owner or keeper of the dog in question:

> "We hold, on public policy factors, that common law liability of landowners and landlords for negligence associated with injuries caused by dogs is limited to situations where the landowner or landlord is also the owner or keeper of the dog causing injury." Id. at par. 55.

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1395 DUTY OF PUBLIC UTILITY: HIGHWAY OBSTRUCTIONS: NONENERGIZED FACILITIES

Public highways are constructed primarily for the use of the public in traveling upon them. In addition to this use, public utilities are permitted to construct within the highway right-of-way facilities, such as poles, wires, and necessary supporting devices and guy wires.

A safety statute provides that the original construction of such facilities must be done in such a manner that the public use of any highway, bridge, stream, or body of water will not thereby be obstructed or incommoded. The original construction must be of such design and the materials used must be of such quality as to withstand the outside forces or deterioration, which would be reasonably anticipated by a person exercising ordinary care.

After the facilities have been constructed, it is the duty of the public utility to exercise ordinary care to maintain the facilities in a reasonably safe state of repair in order to avoid obstructing or incommoding the public use of the highway. The utility has a further duty to exercise ordinary care to make inspections from time to time to learn of any defects that may cause an obstruction or incommode the public use of the highway. The frequency of such inspections is determined by what a person of ordinary intelligence and prudence would do in view of the type and usual life span of the materials used in the constructions and the likelihood or unlikelihood of damage by outside persons or forces.

If a highway obstruction by a utility facility is caused by a force occurrence, such as fire, storm, or vandalism, for which the company was not responsible, then you cannot find the utility negligent unless the utility had notice of the obstruction, or, unless this condition occurred such a length of time prior to the accident that the utility, in the exercise of ordinary care, ought to have discovered

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the obstruction and repaired it. It is the duty of a utility upon receiving notice of damage to its facilities which causes, or is likely to cause, a highway obstruction to repair the facility as soon as is reasonable.

COMMENT

The instruction and comment were originally published in 1967. The comment was updated in 1980 and was reviewed without change in 1989.

Although Wis. Stat. § 182.017 provides that no utility facility "shall at any time obstruct or incommode. . .," the supreme court decided in Gray v. Wisconsin Tel. Co., 30 Wis.2d 237, 140 N.W.2d 203 (1966), that negligence per se was limited to the initial construction and not to inspection and maintenance.

As to the second paragraph regarding ordinary care in original construction, see 74 Am. Jur.2d Telecommunications § 38 (1974); 97 A.L.R.2d 664, 668 (1964); 86 C.J.S. Tel. & Tel., Radio & Television § 46 (1954).

As to the third paragraph, see Gray v. Wisconsin Tel. Co., supra; 86 C.J.S. Tel. & Tel., Radio & Television § 48 (1954); 97 A.L.R.2d 664, 671 (1964).

In Weiss v. Holman, 58 Wis.2d 608, 207 N.W.2d 660 (1973), the court noted that Wis. Stat. § 182.017(2) which describes the duty of a utility is supplemented by the definition of "highway" set forth in Wis. Stat. § 340.01(22).

> We conclude that the precise definition of "highway" found in the Vehicle Code applies to sec. 182.017(2), and defines the usage of "highway" therein. "Highway" includes the "roadway," which is that portion of the road usually used for vehicular travel, and the shoulder of such improved surface where one exists.

The court, in Weiss, also reviewed earlier Wisconsin case law on the issue of utility negligence and noted three legal principles:

> Three principles can thus be drawn from our Wisconsin decisions: First, public utilities as well as municipalities have been held liable in this state on a common-law theory of liability for the improper construction of poles and appurtenances which cause injury to sojourners. Second, while the early cases restricted recovery for injury to those who stayed within the confines of the traveled portion of the highway, the majority of cases since the last third of the 19th century have permitted recovery to sojourners who deviate from the highway proper. Third, although the cases involving nonutilities stress the foreseeability of the deviation rather than distance, the utility cases, especially the early ones, emphasize greatly the distance of the plaintiff's deviation from the highway. In one case, however, four feet was not regarded as too great.[43]

For a case involving negligence of a power company in failing to adequately stabilize a utility pole located near excavation activity, see Jorgenson v. Northern State Power Co., 60 Wis.2d 29, 33, 208 N.W.2d 323 (1973).

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1397 NEGLIGENCE: VOLUNTARY ASSUMPTION OF DUTY TO A THIRD PERSON

A person is negligent if:

(1) The person volunteered to provide services to another;

(2) The person should have recognized those services were necessary for the protection of a third person or their property;

(3) The person failed to exercise ordinary care in providing the services; and

[the failure to exercise ordinary care increased the risk of harm to the third person] [; or]

[the services volunteered to be performed were a duty owed by another to the third person] [; or]

[harm was suffered because of reliance by the third person or another upon the person to provide the services].

COMMENT

This instruction and comment were approved in 2003. The comment was updated in 2011.

Instruct with one or more subsections of paragraph 3 based upon the evidence.

This instruction is taken substantially from Restatement, (Second), of Torts, Section 324A. See Stephenson v. Universal Metrics, Inc., 2002 WI 30, 251 Wis.2d 171, 641 N.W.2d 158; Gritzner v. Michael R., 2000 WI 68, 235 Wis.2d 781, 611 N.W.2d 906; Ladewig v. Tremmel, 2011 WI App 111, 336 Wis.2d 216, 802 N.W.2d 511.

In Ladewig, supra, ¶ 3, the court of appeals concluded that, "even assuming without deciding" that Restatement (Second) of Torts § 324 could create liability for landlords who use a lease provision prohibiting tenants from keeping vicious dogs, Wisconsin case law precludes liability on public policy grounds.

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1401 RAILROADS: DUTY TO RING ENGINE BELL WITHIN MUNICIPALITY

A safety statute provides that no railroad train [or locomotive] shall run over any public grade crossing within any city or village, except where gates are operated, or a flagman is stationed, unless the engine bell is rung continuously within 330 feet of the crossing and until the crossing is reached.

If you find that the train crew failed to sound the engine bell for the required distance, then you must find the crew to be negligent in that regard; however, if you are not satisfied that the crew failed to sound the bell as required by this statute, you must then find the crew not negligent in that regard.

COMMENT

The instruction and comment were originally published in 1967 and revised in 2005 and 2006. The comment was updated in 2006.

Wis. Stat. § 192.29(3).

There is no statutory provision or order requiring the blowing of the engine whistle or horn within a municipality. See Wis JI-Civil 1403.

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1402 RAILROADS: DUTY TO RING ENGINE BELL OUTSIDE MUNICIPALITY

A safety statute provides that a railroad train [or locomotive] running over any public traveled grade highway crossing outside the limits of municipalities shall ring the engine bell continuously from 1/4 mile (1,320 feet) from the crossing until the crossing is reached.

A failure to comply with this statute is negligence.

COMMENT

The instruction and comment were originally published in 1967 and updated in 2005 and 2006.

Wis. Stat. § 192.29(4) as amended by 2005 Wisconsin Act 179.

This statute also provides that the Office of the Commissioner of Railroads may by order dispense with such warning requirements at any particular crossing.

When a crossing is partly in and partly outside the municipality, this statute does not apply. Riley v. Chicago & N.W.Ry., 255 Wis. 172, 179, 38 N.W.2d 522 (1949).

For a discussion of the duty of a railroad train or locomotive to sound a warning bell at a crossing once the train or locomotive has reached the crossing, see Murawski v. Brown, 51 Wis.2d 306, 187 N.W.2d 194 (1971).

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1403 RAILROADS: DUTY TO BLOW TRAIN WHISTLE WITHIN MUNICIPALITY

INSTRUCTION WITHDRAWN.

COMMENT

The instruction and comment were originally published in 1967 and withdrawn by the committee in 2006. The withdrawn instruction and comment read:

> There is no safety statute, ordinance, or regulation that requires the blowing of a whistle as a train approaches a public highway within a municipality; there may arise situations where the blowing of the whistle is required in the exercise of ordinary care as a reasonable precaution to prevent a collision.
>
> If you find that (the engineer) (a member of the train crew) observed the approach of the automobile, and from the observations, knew or should have known that the (driver) (occupant) of the automobile (was) (were) unaware of the train's approach, and, if a whistle warning would have been effective timely to alert (him) (her) (them) to the dangers of a collision, then it became the duty of the (engineer) (member of the train crew) to blow the whistle.

COMMENT

See Wis. Stat. § 192.29(4); Devine v. McGowan, 15 Wis.2d 534, 113 N.W.2d 162 (1962); Webster v. Roth, 246 Wis. 535, 18 N.W.2d 1 (1945).

The train crew is entitled to rely on the assumption that a traveler on a highway "will look and will listen and not go onto the track into danger when it is apparent that a train is approaching, and to continue this assumption until the contrary becomes apparent or he does something to indicate a contrary intention on his part." Keegan v. Chicago, M. St. P. & P. Ry., 251 Wis. 7, 27 N.W.2d 739 (1947). See also Wis JI-Civil 1030, Right to Assume Due Care by Highway Users.

For a case involving a failure to sound a train's whistle at a crossing, see also Krolikowski v. Chicago & N.W. Transp. Co., 89 Wis.2d 573, 577n, 278 N.W.2d 865 (1979), where the jury was instructed on negligence in an emergency situation as follows:

> Railroad engineers of a railroad train who are suddenly confronted by an emergency, not brought about or contributed by their own negligence and who are compelled to act instantly to avoid collision or injury are not guilty of negligence if they make such choice of action or inaction as an ordinarily prudent person might

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make if placed in the same position, even though it should afterwards appear not to have been the best or safest course.

You will bear in mind, however, that the rule just stated does not apply to any person whose negligence wholly or in part created the emergency. One is not entitled to the benefit of the emergency rule unless he is without fault in the creation of the emergency.

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1405 RAILROADS: DUTY OF TRAIN CREW APPROACHING CROSSING

It is the duty of the railroad employees in charge of a locomotive to keep a proper lookout as to the track and the intersecting streets and highways and to observe the streets and highways adjacent to the tracks to ascertain whether persons or vehicles are in dangerous proximity to the track. If any persons or vehicles are in danger of being struck, the railroad employees must do what ordinarily careful and prudent employees would do under the same or similar circumstances to avoid injuring these persons or vehicles.

However, the railroad employees have a right to assume that travelers on a highway approaching a railroad track will look and listen, up to the last opportunity, before entering upon the track and that they will not go onto the track when it is apparent a train is approaching. A railroad employee is entitled to continue in that assumption until the contrary becomes apparent to a person in the position of a member of the railway crew exercising ordinary care.

COMMENT

The instruction and comment were originally published in 1967 and revised in 2005.

The first paragraph is taken from Hynek v. Kewaunee, G.B. & W. Ry., 251 Wis. 319, 321, 29 N.W.2d 45 (1947). See also Dombeck v. Chicago, M. St. P. & P. Ry., 24 Wis.2d 420, 426, 129 N.W.2d 185 (1964). In Van Gheem v. Chicago & N.W. Ry., 33 Wis.2d 231, 243, 147 N.W.2d (1967), the court discussed the Hynek and Dombeck decision in the following manner:

> Hynek and Dombeck stand for the rule that although a railroad may be negligent as to lookout in approaching a crossing which an automobile is approaching at a slow rate of speed, that negligence as a matter of law may not be causal because the engine crew has a right to assume that the driver of an automobile traveling at a comparatively low rate of speed toward a grade crossing will stop his automobile in a place of safety. Hynek, supra at page 322; Dombeck, supra at pages 426-430. This proposition is based upon the physical fact that trains confronted with an

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emergency cannot effectively slow down or stop within a short distance and upon the duty of the driver of the car to look and listen before crossing the railroad track.

The second paragraph is based upon Keegan v. Chicago, M. & St. P. R.R., 251 Wis. 7, 27 N.W.2d 739 (1947); and Bellrichard v. Chicago & N.W. Ry., 247 Wis. 569, 20 N.W.2d 710 (1945).

The second paragraph should be omitted in a fact situation where the evidence indicated no member of the crew saw, or saw too late, to take protective action. For example: (1) where no warning by bell or whistle was given, Van Gheem v. Chicago & N.W. Ry., supra at 244-45; (2) where the evidence would permit the inference that though the bell or whistle or both were first sounded the instant the danger was seen, an earlier observation would have resulted in an earlier warning, Gallagher v. Chicago & N.W. Ry., 255 Wis. 15, 18, 20, 37 N.W.2d 863 (1949).

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1407 RAILROADS: SPEED: FIXED LIMITS

An order of the Office of the Commissioner of Railroads limits the speed of all trains at the highway crossing in question to ____ miles an hour. Any speed in excess of that limit would be a negligent speed regardless of conditions.

COMMENT

The instruction and comment were originally published in 1967 and revised in 1980 and 2005.

The matter of train speeds at grade crossings is in the exclusive jurisdiction of the Office of the Commissioner of Railroads. Wis. Stat. § 192.29(1). This has been the law since 1949. Before then, the statute fixed limits at grade crossings in cities and villages. Dombeck v. Chicago, M. St. P. & P. Ry., 24 Wis.2d 420, 129 N.W.2d 185 (1964).

See also Comment, Wis JI-Civil 1408.

Dombeck v. Chicago, M. St. P. & P. Ry., supra at 432, and its reference to Schulz v. Chicago, M. St. P. & P. Ry., 260 Wis. 541, 51 N.W.2d 542 (1952), alludes to the possibility that a railroad might be negligent if its train was exceeding a company rule as to speed at a crossing that was not affected by a Transportation Commission order.

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1408 RAILROADS: SPEED: NO LIMIT

Even though the Office of the Commissioner of Railroads has not fixed a maximum speed for trains approaching and crossing the highway (street) in question, it is, nevertheless, the duty of the train crew to operate a train at a speed that is reasonable and prudent under the circumstances when there exists in the immediate area of the crossing unusual or peculiar conditions with respect to obstructions to the view of a user of the highway (street) crossing who is in the exercise of due care.

If you find that there existed, at the time and place in question, unusual or peculiar conditions affecting the view of an oncoming train, then it was the duty of the train crew to exercise ordinary care to regulate the train's speed to avoid colliding with any user of the highways who is crossing the tracks in compliance with legal requirements and using due care.

COMMENT

The instruction and comment were originally published in 1967 and revised in 1980 and 2005.

A negligent speed is not causal merely because it brings the train to the grade crossing at the instant it did, even though, if the train had been traveling more slowly, the user of the highway might safely have crossed ahead of the train. Dombeck v. Chicago, M. St. P. & P. Ry., 24 Wis.2d 420, 129 N.W.2d 185 (1964). Also McLuckie v. Chicago, M. St. P. & P. Ry., 5 Wis.2d 652, 94 N.W.2d 182 (1958).

To be causal, the negligent speed must either: (1) mislead the motorist or user of the highway, Reinke v. Chicago, M. St. P. & P. Ry., 252 Wis. 1, 30 N.W.2d 201 (1947); Bellrichard v. Chicago & N.W. Ry., 247 Wis. 569, 20 N.W.2d 710 (1945); Webster v. Roth, 246 Wis. 535, 18 N.W.2d 1 (1945); or (2) interfere with the management and control of the train by the crew to the extent that the crew cannot effectively avoid a collision even though they exercise reasonable care with respect to management and control upon sighting danger. Dombeck, supra. See also Kurz v. Chicago, M. St. P. & P. Ry., 53 Wis.2d 12, 19-23, 192 N.W.2d 97 (1971).

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The Office of the Commissioner of Railroads may, upon petition, determine what maximum speed of a train over a crossing "is reasonably required by public safety and is consistent with the public need for adequate and expeditious passenger and freight service." Wis. Stat. § 192.29(1).

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1409 RAILROADS: NEGLIGENT SPEED, CAUSATION

If by your answer to question ____ you have determined that the train crew was negligent with respect to speed of the train, then to find the negligent speed a cause of the collision (accident), you must find that the negligent speed, under the circumstances, (misled the driver of the car as to the swiftness of the train's approach to the crossing) (prevented the operator of the train, after seeing danger, from slowing down, stopping, or otherwise controlling the train to avoid a collision (accident)).

COMMENT

The instruction and comment were originally published in 1967 and revised in 1980 and 2005.

Wis JI-Civil 1408 defines "negligence as to speed" where there is no limitation of speed by order of the Office of the Commissioner of Railroads. A negligent speed is not causal merely because it brings the train to the grade crossing at the instant it did, while if the train had been traveling more slowly the user of the highway might safely have crossed ahead of the train. Dombeck v. Chicago, M. St. P. & P. R.R., 24 Wis.2d 420, 129 N.W.2d 185 (1964).

To be causal the negligent speed must either: (1) mislead the motorist or user of the highway, Reinke v. Chicago, M. St. P. & P. Ry., 252 Wis. 1, 30 N.W.2d 201 (1947); Bellrichard v. Chicago & N.W. Ry., 247 Wis. 569, 20 N.W.2d 710 (1945); Webster v. Roth, 246 Wis. 535, 18 N.W.2d 1 (1945); or (2) interfere with the management and control of the train by the crew to the extent that the crew cannot effectively avoid a collision even though they exercise reasonable care with respect to management and control upon sighting danger. Dombeck, supra.

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1410 RAILROADS: DUTY TO MAINTAIN CROSSING SIGNS

A safety statute provides that every railroad corporation shall maintain a large signboard on each side of the track and near the track at every crossing of a public highway or street. The sign shall bear the words "RAILROAD CROSSING" in large letters so as to be visible to approaching traffic on the highway or street for a distance of at least 100 feet. If a railroad corporation through its employees knew or should have known that such a sign or signs were not maintained at the crossing in question and failed to erect such a sign within a reasonable time of the discovery of its absence, then it would be negligent with respect to its duty to warn users of the highway in the manner required by this statute.

COMMENT

The instruction and comment were originally published in 1967 and revised in 2005. The comment was also updated in 1980.

See Wis. Stat. § 192.29(5).

This instruction is to be used only where the crossing is not covered by an order of the Office of the Commissioner of Railroads. Since the office has exclusive jurisdiction to make rules, if the office has acted as to a certain crossing, then there is no other duty except the duty to comply with the order. Schulz v. Chicago, M. St. P. & P. Ry., 260 Wis. 541, 545, 51 N.W.2d 542 (1952).

In Schulz v. Chicago, M. St. P. & P. Ry., supra at 544, the court approved the principle of the following instruction though finding it inapplicable to the particular case:

> In addition to the requirements made by statute for every railroad crossing, the railroad company may be required in the exercise of ordinary care to take additional precautions or erect or maintain more adequate warning devices at grade crossings over a public highway where such crossing is unusually dangerous.

While it is true that in the absence of statute, ordinance, or order, there is no duty upon the railroad to provide a flagman or other warning device at a crossing, yet a railroad may be negligent in obstructing a highway grade crossing — particularly at nighttime — where such obstruction is needless or unreasonable

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and incidental to operational requirements. McLaughlin v. Chicago, M. St. P. & P. Ry., 31 Wis.2d 378, 143 N.W.2d 32 (1966).

In Gamble-Skogmos v. Chicago & N.W. Transp. Co., 71 Wis.2d 767, 238 N.W.2d 744 (1976), the court distinguished between a situation where an order authorizes certain protective devices and where an order directs or requires such conduct. In the latter situation, the court concluded that a railroad is immunized against a claim that it was doing more or differently than the order directed and required. In the former situation, where the order simply authorizes or approves conduct, the immunity from the doctrines of common-law negligence is not so conferred. In Gamble-Skogmos, supra, the court discussed earlier case law on the issue and repeated the test for immunization first declared in Kurz v. Chicago, M. St. P. & P. R.R., 53 Wis.2d 12, 192 N.W.2d 97 (1971):

> Thus, under Kurz, to immunize from liability for common-law negligence it is not enough that the public service commission have authorized or approved plans for protective devices at a grade crossing. To confer such immunity the order of the commission must be based on a review of the public safety requirements of the particular crossing, and must direct and require the installation of such crossing protection devices as will meet such established safety requirements. Such holding is not inconsistent with the decision in Verrette, where the order of the commission clearly found the protective devices installed to be "consistent with the public safety." Nor is it inconsistent with Schulz holding immunity follows where, with public safety considered, the commission "has directed a crossing to be guarded in a particular manner and the railroad has done as directed." (Emphasis supplied.) Even if the Kurz decision did not thus square with Schulz and Verrette, we would follow Kurz as the latest and controlling statement of the rule of law involved. 71 Wis.2d at 773.

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1411 RAILROADS: DUTY TO MAINTAIN OPEN VIEW AT CROSSINGS

A statute provides that every railroad shall keep its right of way clear of brush or trees for a distance of not less than 330 feet in each direction from the center of its intersection at grade with a public highway and for such further distance as is necessary to provide an adequate view of approaching trains from the highway.

A failure to comply with this statute (unless excused by the Office of the Commissioner of Railroads) is negligence.

COMMENT

The instruction was originally published in 1967 and revised in 2005. The comment was updated in 1980 and 2005.

Wis. Stat. § 195.29(6); Wilmet v. Chicago & N.W. Ry., 233 Wis. 335, 345-46, 289 N.W. 815 (1939).

The purpose of Wis. Stat. § 195.29(6) is to provide highway traffic with a better view of approaching trains. It places a duty on railroads, municipalities, and persons or corporations owning or occupying lands to clear brush and trim trees to allow greater visibility. Violation of this duty, without excusal by the office of the Commissioner of Railroads, is subject to forfeiture. In Wells v. Chicago & N.W. Transp. Co., 91 Wis.2d 565, 568, 571, 283 N.W.2d (Ct. App. 1979), the court noted that Wis. Stat. § 195.29(6) constituted a "safety statute which would generally be considered to set the standard of conduct in negligence actions." In Wells, the court held that public policy reasons preclude subjecting a private landowner to civil liability to highway uses for violation of Wis. Stat. § 195.29(6). The court also restricted the sweep of the Wilmet decision stating that railroads and municipalities stand in an entirely different position from private landowners with regard to liability for accidents at railroad crossings.

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1412 RAILROADS: DUTY TO HAVE PROPER HEADLIGHTS

A safety regulation provides that every steam locomotive used in road service between sunset and sunrise shall have a headlight which affords/provides sufficient illumination to enable a person in the cab of the locomotive who possesses the usual visual capacity required of a locomotive engineer to see, in a clear atmosphere, a dark object as large as a man of average size standing at least 800 feet ahead and in front of the headlight, and the headlight must be maintained in good condition.

A failure to comply with this regulation is negligence.

COMMENT

The instruction and comment were originally published in 1967 and updated in 2005.

49 C.F.R. § 230.86 Federal Railroad Administration. For headlight regulations covering other locomotives, see 49 C.F.R. § 229.125.

The United States Supreme Court has determined that jurisdiction over railroads whose tracks are used in interstate commerce rests exclusively with the I.C.C. Chicago & N.W. Ry. v. Railroad Comm'n of Wisconsin, 272 U.S. 605 (1926).

The Wisconsin statute was substantially similar; see Randall v. Minneapolis, St. P. & S.S.M. Ry., 162 Wis. 507, 156 N.W. 629 (1916). This statute last appeared in the statute books in 1927 as § 192.45. It was considered abrogated by the U.S. Boiler Inspection Act; see Chicago & N.W. Ry. v. Railroad Comm'n of Wisconsin, supra. Chapter 504, § 120, Laws of 1929, ordered that § 192.45 no longer be printed.

49 C.F.R. § 230.129 (1979), Federal Railroad Administration requires similar lights on the rear of those locomotives which are regularly required to run backwards for any portion of a trip. 49 C.F.R. § 230.129 (1979) provides that locomotives used in yard service between sunset and sunrise shall have two (2) lights, one on the front and one on the rear, which will permit one in the cab to see — under the same conditions as set forth in § 230.129(a) — a distance of 300 feet.

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1413 RAILROADS: ULTRAHAZARDOUS OR UNUSUALLY DANGEROUS CROSSINGS: INCREASED DUTY

It is claimed that the crossing in question is unusually dangerous. In determining whether the crossing in question is ultrahazardous or unusually dangerous, you may consider the amount of traffic on the highway, obstruction to view, usual speed of trains, visibility of approaching trains to the travelers on the highway, and any other conditions which make a crossing unusually dangerous.

If you are satisfied that the crossing in question is unusually dangerous, the defendant, in the exercise of ordinary care, is required to take additional precautions, commensurate with the hazards existing, for the protection of persons using the crossing, by installing better safety devices and by taking other measures for their protection as are adequate under the circumstances and conditions existing at the crossing.

COMMENT

This instruction and comment were approved in 1977 and updated in 2005.

The question is phrased in terms of negligence and if used would follow the general instruction on negligence of railroads at crossings.

The court must first determine whether to submit the instruction — i.e., whether issues created by the evidence warrant its use.

Kurz v. Chicago, M. St. P. & P. R.R., 53 Wis.2d 12, 21, 23, 192 N.W.2d 97 (1971), states:

> A railroad at common law has the duty of ordinary care to install and maintain warning devices at a grade crossing . . . . This duty is not necessarily limited by statutory requirements such as sec. 192.29(5) Stats., relating to railroad signs.
>
> An "ultrahazardous crossing" is a relative term and simply means the hazards of the railroad crossing demand more or better safety devices than it has or that the

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maximum speed at which a train may cross such crossing should be lower and commensurate with the hazards.

. . . [T]he general jurisdiction granted to the public service commission to require safety devices or to regulate railroad speed is not enough to immunize the railroad from the doctrine of common-law negligence. The public service commission must exercise its jurisdiction and make an order based upon the safety requirements of the crossing; the approval of plans for signals proposed by the railroad, without more is not enough. Consequently, the instruction in this case was proper if the evidence concerning the hazards justified it.

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